

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
INDIANA - SOUTH BEND DIVISION

ALAN ENGLAND, :
Plaintiff, :
:
v. : C.A. No. 3:09 CV 408
:
GAF MATERIALS CORPORATION, :
Defendant. :

- - -

August 18, 2010

- - -

Oral deposition of J. NIGEL ELLIS,
Ph.D., P.E., CSP, CPE taken pursuant to notice at the
Homewood Suites by Hilton, 350 Rocky Run Parkway,
Wilmington, Delaware, commencing at approximately 9:00
a.m., before Gloria M. D'Amore, Registered Professional
Reporter and Notary Public.

- - -

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DEPOSITION OF: J. NIGEL ELLIS, Ph.D., P.E., CSP, CPE

EXAMINATION

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E X H I B I T S

1. Packet of documents were premarked 5
as Ellis Exhibit No. 1.

2. Curriculum Vitae of J. Nigel Ellis, 5
Ph.D., CSP, P.E., CPE was premarked
as Ellis Exhibit No. 2.

3. Document entitled Deposition/Trial 5
testimony provided by Dr. J. Nigel
Ellis was premarked as Ellis
Exhibit No. 3.

4. Notes were marked as Ellis Exhibit 19
No. 4.

5. Sketch was marked as Ellis Exhibit 5. 21

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11.	ANSI/ASSE A1264.1: Background Materials	79
	was marked as Ellis Exhibit No. 11.	
12.	Sketch was marked as Ellis Exhibit	105
	No. 12.	
	(Original notes, Exhibit Nos. 4,	
	6, 7 and 9 were retained by	
	witness, J. Nigel Ellis.)	

1 (Packet of documents were premarked as
2 Ellis Exhibit No. 1 for identification.)

3 (Curriculum Vitae of J. Nigel Ellis,
4 Ph.D., CSP, P.E., CPE was premarked as Ellis Exhibit No.
5 2 for identification.)

6 (Document entitled Deposition/Trial
7 testimony provided by Dr. J. Nigel Ellis was premarked as
8 Ellis Exhibit No. 3 for identification.)

9 J. NIGEL ELLIS, Ph.D., P.E., CSP, CPE,
10 having first been duly sworn according to law, was
11 examined and testified as follows:

12 BY MR. NYE:

13 Q. Would you state your name, please, for the
14 record?

15 A. John Nigel Ellis.

16 Q. Mr. Ellis, we met. My name is Randall Nye.
17 As you know, I represent the defendant in the case filed
18 by Alan England. I assume you've had your deposition --
19 well, I know you've had your deposition taken many times
20 before.

21 So, you're familiar with the procedure?

22 A. Hopefully.

23 Q. It's probably unnecessary, but I will ask you
24 to please let me know if any question is unclear, and

1 I'll be glad to restate it.

2 Is that fair enough?

3 A. If it occurs to me to do so. Sometimes it
4 occurs much later in the process after I read my
5 deposition. So, I would answer the question by saying,
6 hopefully I would capture it by the time I'm reading my
7 deposition.

8 Q. Well, again, I'll just ask you if you're
9 unclear about what I'm getting at, would you please tell
10 me, and I'll restate it.

11 A. If I'm consciously aware. Yes.

12 Q. What's your date of birth?

13 A. 1/19/42.

14 Q. Exhibit No. 2 is a copy of your Curriculum
15 Vitae?

16 A. True.

17 Q. Is this up to date?

18 A. I believe so.

19 Q. I've looked through your CV. You have a
20 Ph.D., and that's from Manchester University in 1966.

21 Correct?

22 A. Correct.

23 Q. Your Ph.D. was in what?

24 A. I think it's stated in my CV.

1 Q. It says photochemical processes.

2 What does that mean?

3 A. That's the subject matter. That's producing
4 highly complex chemicals from the effect of light over a
5 period of time on mixtures of several chemicals, several
6 simple chemicals.

7 Q. That didn't have anything to do with worker
8 safety, I take it?

9 A. The Ph.D.?

10 Q. Yes.

11 A. Apart from staying out of harm's way with
12 those chemicals.

13 Q. Right. What I'm getting at is your education
14 prior to that did not focus on safety engineering or
15 anything like that?

16 A. That's correct.

17 Q. And it looks like you were a research chemist
18 for DuPont, 1967 to 1968?

19 A. Yes.

20 Q. Looking at your resumé, it looks to me the
21 first reference to something related to safety was -- you
22 indicate you were President of Research & Trading
23 Corporation, 1970 to 1986.

24 What is Research & Trading Corporation?

1 Is that a name of a corporation?

2 A. Yes. It started before that.

3 Q. The years given are '70 to '86?

4 A. True. But I'm talking about the work of
5 safety began the first day I joined the DuPont company.

6 Q. In 1968 -- '67?

7 A. 1967. Correct.

8 Q. Research & Trading Corporation, is that the
9 name of the corporation?

10 A. That's correct. At the time, yes.

11 Q. And you were President?

12 A. Yes.

13 Q. Were you an owner of that business?

14 A. Yes.

15 Q. Were you the sole owner?

16 A. At times sole owner. Yes.

17 Q. And what was the business of that corporation?

18 A. To develop products that were located overseas
19 and develop them into products that could be sold in the
20 U.S. That's how I started. And I ended up picking the
21 safety area for work at height and developing that into
22 products that were geared for America.

23 Q. Does Research & Trading Corporation still
24 exist?

1 A. It does. Yes. It's part of the division of a
2 company that bought RTC, which is Sellstrom
3 Manufacturing. S-E-L-L-S-T-R-O-M.

4 Q. So, you sold that business in its entirety in
5 1986 to Sellstrom Corporation?

6 A. It was 1996.

7 Q. Oh, '96. Okay.

8 Did the business change names to Safety
9 Manufacturing? No. I see. Never mind. Dumb question.

10 A. The business expanded. So, it needed a change
11 of title.

12 Q. The business was sold in 1996?

13 A. Correct.

14 Q. This indicates from 1985 to 2004 you were
15 President of Dynamic Scientific Controls, Inc.?

16 A. True.

17 Q. Is that a consulting firm only or what?

18 A. Yes.

19 Q. Any other sort of services or products?

20 A. Within DSC or Dynamic Scientific Controls?

21 Q. Within Dynamic Scientific Controls.

22 A. I think consulting for corporations and
23 consulting litigation support are the two parts.

24 Q. And is it still in existence?

1 A. What's that?

2 Q. Dynamic Scientific Controls, Inc.

3 A. It's a parent of the fall companies.

4 Q. It's a parent of Ellis Fall Safety Solutions,
5 LLC?

6 A. Yes.

7 Q. These are separate corporations?

8 A. Yes. I think it's an LLC, Ellis Fall Safety
9 Solutions. Otherwise, DSC, Dynamic Scientific Controls,
10 is a corporation.

11 Q. Who were the owners of these corporations?

12 A. I have been and am the owner of those
13 corporations.

14 Q. Of both of them?

15 A. Yes.

16 Q. Sole owner?

17 A. At this time, yes.

18 Q. And how many employees of Dynamic Scientific
19 Controls?

20 A. Three is the answer, the proper answer to that
21 question.

22 Q. And how many employees of Ellis Fall Safety
23 Solutions, LLC?

24 A. Same answer.

1 Q. Is there overlap between the employees?

2 A. Yes.

3 Q. Are we talking about the same three human
4 beings?

5 A. That's correct.

6 Q. Who are they?

7 A. Anna, Andy and me.

8 Q. Could I ask for last names?

9 A. P-A-N-C-O-A-S-T. That's Anna. And
10 D-U-R-N-E-Y is Andy.

11 Q. What are their roles? You're president of
12 both of these corporations, I take it?

13 A. Yes. Except, of course, LLCs don't have
14 presidents in them. I'm the executive member. So, Anna
15 is assistant to me. And Andy is the accountant for all
16 of the businesses.

17 Q. And Ellis Litigation Support, is that again
18 another division of Dynamic Scientific Controls?

19 A. It's a DBA. Yes.

20 Q. DBA. Okay.

21 So, again, the same people work for...

22 A. Yes.

23 Q. Do these three -- well, DBA and two
24 corporations -- two business entities share the same

1 place of business?

2 A. Yes.

3 Q. And where is that?

4 A. 306 Country Club Drive.

5 Q. Is that your home, as well?

6 A. It is. Obviously, not the same space.

7 Q. When was your first contact with Mr. Foley's
8 firm?

9 A. The file is on your side of the table. So,
10 probably, late 2008. It appears to be during December of
11 2008. And the first discussion with Ed Foley was the
12 12th of March of 2009 about the case.

13 Q. If you'll forgive me, I want to back up a
14 little bit to your resumé.

15 A. Sure.

16 Q. You indicated you were a developer of safety
17 appliances. And you're a patent holder. Let's start
18 with the patent holder.

19 Do you hold any patents on any devices
20 that are relevant to loading and unloading trucks?

21 A. Yes.

22 Q. And what sort of device is that?

23 A. One that comes to mind is a ladder that is
24 specially designed for access by truckers to the flatbed

1 surface.

2 Q. I don't suppose you know the patent number?

3 A. I don't. But it's known as the Anderson
4 Ladder. So you can probably Google it.

5 Q. Anderson?

6 A. Mum-hum.

7 Q. Is that in production?

8 A. Yes.

9 Q. Why so modest? Why name it after Anderson?
10 Why not the Ellis Ladder?

11 A. Because he was the truck driver who was
12 injured in the fall, who designed this for helping other
13 truck drivers not to be injured falling off of their
14 decks.

15 Q. If Mr. Anderson designed it, why --

16 A. We're co-patent holders. So, I provided the
17 technical expertise.

18 Q. What does an Anderson Ladder cost?

19 A. Around \$300.

20 Q. Focusing on this particular case, that of Alan
21 England, would an Anderson Ladder have been useful to
22 him?

23 A. I think it's useful to every truck driver to
24 get up on their flatbed. But I believe he was doing

1 something involving more than simply getting onto his
2 flatbed at the time of his fall.

3 Q. And these are patents that have something to
4 do with flatbed trucks?

5 A. It's possible. But nothing comes to mind
6 right now.

7 Q. And your resumé says developer of safety
8 appliances.

9 Other than the Anderson Ladder, anything
10 relevant to flatbed truck loading?

11 A. I thought you just asked me that question. I
12 said nothing else that comes to mind, other than the
13 ladder for accessing the main deck.

14 Q. Not every device is patented is what I was
15 getting at?

16 A. That's true. That's correct. Thank you.

17 Q. Back to this case.

18 I notice in your file, and I apologize,
19 we'll end up passing this back and forth, there are some
20 papers in your file, an E-mail and a CV from a
21 Christopher Gadoury, an attorney in Texas.

22 What does he have to do with this case?

23 A. Apparently, he was involved in the process of
24 getting from a colleague of mine in Chicago, who was an

1 expert, to Gadoury to Ed Foley.

2 Q. So, Mr. Gadoury had something to do with the
3 process of recommending your services?

4 A. Yeah. Or evaluating my services. Yes.

5 Q. Has he played any role in the formulation of
6 your opinions or gathering information?

7 A. Neither.

8 Q. Looking at your file, there is a letter dated
9 the 9th of November of 2008 from you to Chris Gadoury.
10 In your letter you say, Quote, Certain hours may be
11 traded at various stages with Garland Cherry, Esquire,
12 trial attorney in Clermont, New Jersey for strategy
13 sessions, upon agreement and designed to improve the
14 value of my testimony, close quote.

15 Who is Mr. Cherry, and what did he have
16 to do with this case?

17 A. The last part is nothing. The answer to the
18 first part is, he's a friend and formerly an attorney in
19 personal injury who has been a colleague of mine for over
20 20 years.

21 Q. But he had no assistance in this case?

22 A. No.

23 Q. Did you ever discuss this case with Mr.
24 Cherry?

1 A. No. Not that I recall.

2 Q. Just to tidy things up, Exhibit No. 1 is a
3 copy of the report you prepared for Mr. Foley?

4 A. Yes. The first few pages are the report that
5 I prepared for Mr. Foley.

6 Q. Who put together the rest?

7 A. I presume Mr. Foley's office.

8 Q. Okay. So, the part you prepared is pages --
9 the seven-page document at the front of it on your
10 letterhead, and the rest was put together by Mr. Foley's
11 office?

12 A. I'm not sure what "put together" means.
13 Essentially, part of my CV, I guess, trying to provide
14 information about me in a sense. It's not part of my
15 report, though. And then there's the article I put into
16 Professional Safety on truck -- trucking and particularly
17 tarping of flatbed trailers. And nobody put in the web
18 pages that I have on trucking. I don't see that here.
19 That should be part of it. Also, some photographs that
20 were taken of the yard, which is used for strapping and
21 tarping.

22 Q. If I could stop you there just for a second.

23 In this report, there are four
24 photographs.

1 Were you provided with any others?

2 MR. FOLEY: I got more than that,
3 Randall.

4 MR. NYE: What I'm asking is what Mr.
5 Ellis looked at.

6 MR. FOLEY: I mean, there's five in the
7 report, I think.

8 MR. NYE: Are there five? You're right.
9 My mistake. My apologies.

10 BY MR. NYE:

11 Q. There are five photographs here?

12 A. Yes.

13 Q. Did you review any others?

14 A. Don't know. If I have them, I did. If I
15 don't have them, I probably didn't. That's all I recall
16 anyway. I don't recall anymore. There was a videotape,
17 also, of the same environment that you're holding open
18 right now.

19 Q. Right. So, the video, the five photographs.

20 Any other photographs or recordings that
21 you saw?

22 A. Nothing that I have with me. I don't recall
23 anything in the file box.

24 Q. And then we have here a diagram. I take this

1 to be -- well, actually, seven -- four diagrams. My
2 impression is Alan England prepared these and sent those
3 to you.

4 Correct?

5 A. Yes. At my request.

6 Q. And the records of the ambulance service, it
7 looks like?

8 A. Yes.

9 Q. And, of course, I assume your office prepared
10 the list of deposition testimony?

11 A. Yes.

12 Q. Any other materials or information provided to
13 you by Mr. Foley or his office?

14 A. The depositions.

15 Q. Right. You list those in the report, of
16 course?

17 A. Correct.

18 Q. My mistake.

19 Adding onto the depositions, any other
20 materials or information provided by Mr. Foley's office?

21 A. The agreement with Mr. Foley. I think that's
22 it. My CV.

23 Q. Your report indicates that you provided the
24 OSHA and ANSI standards that you refer to in your report.

1 And your report indicates that you had a discussion with
2 Alan England.

3 Could you, please, tell me about that?

4 A. I think there were three discussions
5 altogether. I was trying to get -- if it's possible -- I
6 try and interview the surviving plaintiff or witness just
7 to get my questions answered or a direction and summary
8 to the deposition of that witness.

9 Q. In person or by telephone?

10 A. Phone.

11 Q. And did you record these conversations?

12 A. No.

13 Q. Did you take notes?

14 A. Yes.

15 Q. Could I see the notes, please?

16 A. They're on the yellow sticky. So, if you want
17 to leaf through them, you can do it. They're on the
18 edge. So, the bottom one would be the first one, if it
19 has his name on it.

20 MR. NYE: Off the record.

21 (An off-the-record discussion took place
22 at this time.)

23 MR. NYE: Back on the record.

24 (Notes were marked as Ellis Exhibit No.

1 4 for identification.)

2 BY MR. NYE:

3 Q. Mr. Ellis, I want to refer you to what has
4 been marked as Ellis Exhibit No. 4. These are a group
5 exhibit consisting of, I don't know, ten or eleven
6 handwritten pages. This is from your file.

7 Correct?

8 A. Yes.

9 Q. And these are notes you took during your
10 telephone conversation with Mr. England, it looks like,
11 on March 12, 2009?

12 A. Inclusive of those, yes.

13 Q. And can you tell from this how long you spent
14 talking to Mr. England?

15 A. An hour.

16 Q. Can you read this for me?

17 A. My example of Soja.

18 COURT REPORTER: I'm sorry, Doctor.

19 THE WITNESS: Soja. Capital S-O-J-A.

20 BY MR. NYE:

21 Q. And what does that mean?

22 A. Mr. Soja is an attorney in Connecticut.

23 Q. Why did you write his name down?

24 A. Because I thought there may be a solution

1 along the lines that I prepared for him relating to truck
2 accidents and work at height.

3 Q. What do you mean by "a solution?"

4 A. For Mr. England and other drivers at the GAF
5 plant in Michigan City.

6 Q. What is that solution?

7 A. That's it. It's a duplicate.

8 MR. NYE: Would you mark that, please.

9 (Sketch was marked as Ellis Exhibit No.
10 5 for identification.)

11 BY MR. NYE:

12 Q. Exhibit No. 5 is something that you brought
13 with you.

14 Can you explain what this is?

15 A. That's the sketch that I did in the Soja case
16 showing how this particular truck in that case could have
17 been accessed for cleaning up the garbage, especially,
18 plastic bags hanging over the side of the very large
19 garbage truck so they could roll the tarp over in
20 preparation for a long drive.

21 Q. So, this is a device -- did you testify in
22 this Soja case?

23 A. I think the case was settled the day before
24 trial.

1 Q. Did you give a deposition?

2 A. I want to say yes.

3 Q. Is this case on the list of depositions in
4 your report?

5 A. If it is, I gave a deposition. If it isn't, I
6 didn't. But usually, I prepare this for a deposition or
7 a report.

8 Q. And is it your opinion that this kind of
9 device should have been installed at the GAF plant?

10 A. Maybe I should change the word should to
11 could. It's one of many examples.

12 Q. And the next word I'm going to point you to --

13 A. Prohibition of going unload.

14 Q. What does that mean?

15 A. Don't know. Sometimes companies prohibit you
16 from climbing on your load.

17 Q. Does this refer to a remark by Mr. England?

18 A. Don't know. Probably me.

19 Q. What's this down here?

20 A. Three straps. Two for first bundle. One for
21 next bundle.

22 Q. Let's try this.

23 With this in front of you, to whatever
24 extent it refreshes your recollection or from your

1 memory, please tell me what information you got from Mr.
2 England in this conversation on March 12, 2009.

3 A. Well, he was on the third strap. He had done
4 pickups at GAF previously. He was an owner/operator.
5 There were 14 pallets of shingles on the trailer. The
6 trailer was eight-foot wide. Two-inch rub rail. R-U-B,
7 R-A-I-L. Two words. 48-feet long. I can't read my own
8 writing to follow. Essentially, the load was centered.
9 The drip edge around the trailer was four-inches wide,
10 which he later corrects to three and three-quarter inches
11 wide. Not much of an edge to walk on. On the ground
12 usually throw straps over the tarp to get on the load.
13 It's not a sentence there. Throw straps over tarp, get
14 on load. It sounds like what action he took at the time.

15 A lot of confusion at the time in the
16 plant because the main gate was closed. Lots of traffic
17 going in both directions. Throwing the steel buckle over
18 and hit another guy's truck. Throw up on tarp and
19 climbed and dropped it through. Then lost memory. Woke
20 up in the hospital.

21 Softeners. Edge protection. Nice day.
22 Must go on the load. 25 miles and stop and check the
23 load. Every two hours after that.

24 Q. Would you explain that, please?

1 A. It is a requirement that you check that the
2 straps are tight on the load within 25 miles beginning of
3 the journey.

4 Q. Meaning, he told you that he had to stop every
5 25 miles and get up on the load?

6 A. That's standard that you got to stop your
7 trip, presumably by pulling the truck over and check that
8 your straps are secure. And then subsequently every two
9 hours after that. I didn't ask him every different way
10 of doing that, if he had to climb up on the truck. I
11 don't know if I asked that question. When on the road
12 over the years, I've seen drivers on the road up on top
13 of their trucks or their trailers.

14 On tarp. Query. Pull strap. Shingles
15 don't move much. Tarp had bungees. Loaded with a
16 forklift. Sent to the tarping and strapping area.
17 Exposed outside. I can read the words, but I don't
18 understand the context. Bill of lading is the last thing
19 that picks up. Must load. Must be tarped.

20 Q. Mr. England told you his load had to be
21 tarped?

22 A. Yes. Required.

23 Q. Required by who?

24 A. Whatever paperwork he had.

1 Q. Have you ever seen the bill of lading in any
2 of the paperwork for this load?

3 A. I don't think so. Mr. Foley says that he has
4 it. So, I'll look at it. Maybe I just forgot. But I
5 didn't see it when I was packing up the materials today.

6 Q. Okay. Sorry to interrupt you. Go on, please.

7 A. Aluminum plants. Safe area to work. It's a
8 closed-sided dock, specifically in other plants. Gives
9 an example of Newburgh, Indiana. System for two trailers
10 with a wire. No getting on the load at Alcoa. It's too
11 dangerous.

12 Q. Excuse me. It looks like \$100 you wrote down
13 there.

14 What does that mean?

15 A. Don't know. Talked about four-foot deck and
16 six-foot coil at an Alcoa plants. Both had wires
17 overhead. Rope and harness.

18 Q. So, Mr. England is describing to you some
19 things he saw at an Alcoa plant in Newburgh, Indiana?

20 A. Amongst many other Alcoa plants. Primarily,
21 it looks like he was transporting coil to and from these
22 locations.

23 Q. Have you, yourself, ever been to any of the
24 Alcoa plants?

1 A. Many. I've been the Alcoa fall protection
2 engineering consultant now since 1973.

3 Q. Go ahead.

4 A. At this GAF plant, typically, there would be
5 30 truck trailers strapping and tarping. All loading and
6 storage was outside in the Michigan City plant. Level
7 area. Alcoa is the best.

8 Q. What does that mean?

9 A. I'm reading into my memory here. For
10 consistency from plant to plant to having different but
11 yet effective measures for getting fall protection of
12 drivers.

13 Q. Is this something that Mr. England said, or is
14 it just your opinion, your writing?

15 A. No. It's his words that I'm --

16 Q. That's what I was getting at.

17 Those were his words?

18 A. Correct. Yes. Right. But there are also
19 notes that others do it. And I presume -- I don't know
20 how the ISO 9000 came up. I don't know whether I
21 mentioned that. I don't think I would. But I'm not sure
22 how he would know that, but maybe he does because of his
23 military background.

24 Q. What is the ISO 9000?

1 A. It relates to consistency of production or
2 operation, such that the consistency leads to a level of
3 productivity that can be related to production in a
4 plant. ISO 9000 is the testing standard to which all
5 operations are measured if you undergo the services of
6 that standard.

7 Q. Whose standard is this?

8 A. ISO is International Standards Operations for
9 Geneva. That's the standard for plants to adopt.
10 Manufacturing adopts ISO 5000 series. And this process
11 might have been the ISO 9000 process.

12 Q. And Mr. England was familiar with that?

13 A. He may have been. I could, certainly,
14 probably say I wasn't familiar enough to actually write
15 down ISO 9000 unless it was mentioned.

16 It says the old, old companies are not
17 doing it. It says he pulled in and there were -- I'm
18 thinking concrete blocks on one side and nothing on the
19 other side. Got paperwork. There was remodeling going
20 on. Got paperwork from the guard area. Checked it.
21 Other truckers were doing the same. Tractor trailers
22 were parked close by for strapping and tarping. Four
23 feet is too much. Separation. Two feet is okay. There
24 were 25 trucks there, approximately.

1 Q. Would you explain that, please, four feet is
2 too much? What is that?

3 A. I approached this several times in the other
4 two times I talked with him. The context changes of
5 what's too close, what's too far away and what's just
6 right. So, this was relating to how close trucks either
7 are or should be. And the facility for tossing the
8 steel, or the buckle on the strap over the truck.

9 Q. And what did Mr. England tell you in that
10 regard?

11 A. In one context he says four feet is too much.
12 Two feet is okay. So, somewhere in my interpretation of
13 that is between two and four feet is just fine at that
14 time in that discussion.

15 Q. So, he's referring to how close the semis
16 should be to each other while they're being strapped?

17 A. Strapped.

18 Q. And he says two feet is too close, four feet
19 is too far away?

20 A. In this conversation, two feet is okay. Four
21 feet is too much. I'm not sure what the context is.
22 There were other conversations about this to follow that
23 I didn't understand myself.

24 I think this, also, is dealing with the

1 view from the street. So, either had the pictures, or
2 the time, or I had seen the video, and he's recalling
3 that.

4 The opening times of the plant at
5 Michigan City. He says there were no signs relating to
6 -- getting in until they, the truck drivers, figured out.
7 Photos were taken from the curb.

8 Q. If I can interrupt you there.

9 The photographs that are attached to
10 your report, do you know who took those?

11 A. Either he did or Mr. Foley did.

12 Q. Did you have input into what was being
13 photographed? Did you ask them to photograph anything in
14 particular?

15 A. No. This was before I was involved.

16 Q. And the same sort of question with regard to
17 the videotape.

18 Did you have any input into what was
19 photographed or from what angle?

20 A. No.

21 Q. I'm sorry. Go ahead.

22 A. The limitation was the fence, I think.

23 A load was going to Georgia. Had to
24 wait for 30 to 45 minutes. I asked him to draw a bird's

1 eye sketch, which he subsequently did. Got the
2 impression that his truck and trailer were trapped while
3 the trucks couldn't really move. Had the buckle and
4 strap -- he threw the first two over successfully. He
5 didn't know the other driver. Didn't see him.

6 Conversation returns to tarps.
7 140 pounds each. Four feet. I don't know what that four
8 feet refers to. Throw up on the trailer. Rolled to the
9 roller on -- rolled to roll on. Tarps and shingles
10 another four feet. I'm not sure how to make that into a
11 sentence. One tarp for the whole load. Rolled down.
12 Very few gaps between the bundles. No other choice.

13 Q. No other choice about what?

14 A. To do what he did, I'm assuming.

15 Q. Do you recall anything else, any other
16 information that you got from Mr. England in that first
17 conversation on March 12, 2009?

18 A. No.

19 Q. Could you locate, if you could, locate your
20 notes for your next conversation with Alan England?

21 A. I had a conversation on the 9th of June of
22 2010.

23 Q. With Mr. England?

24 A. He was on the call. Yes.

1 Q. And was Mr. Foley also on the call?

2 A. Yes.

3 MR. NYE: If we could have a moment.

4 Would you mark this, please, again
5 anyplace. We don't want to obscure anything that was
6 written.

7 (Notes were marked as Ellis Exhibit No.
8 6 for identification.)

9 BY MR. NYE:

10 Q. Mr. Ellis, what has been marked as Exhibit No.
11 6 are your notes of your conversation with Mr. Foley and
12 Mr. England on June 9, 2010?

13 A. Yes.

14 Q. Would you do the same thing here? Go through
15 here, and either from your memory or from whatever --
16 let's put it this way.

17 What new information did you get in this
18 conversation?

19 A. I would have to refer to it. How about if I
20 answer that question by simply going through it and
21 giving you what's new?

22 Q. Fair enough.

23 A. So, on that phone call, somewhere in the
24 middle of that phone call with Mr. Foley, Alan England

1 was reached by phone.

2 He had been in the plant before 30 times
3 over the past six or seven years. Confirms that his
4 vehicle was trapped. Confirms that he was feeding web
5 strap through the rub rail gap.

6 Q. Now, where did he say he was when he was
7 feeding it through the --

8 A. We haven't got there yet. We may not get
9 there here.

10 Q. All right. Go ahead.

11 A. Asked about rules for truck drivers. He said
12 there were none. Other plants, yes. Number of trucks
13 there per day, he estimates, 150 per day at which 10 to
14 15 were GAF trucks and trailers.

15 Confirms that the height of the pallets
16 of shingles was four feet. And the bed was around four
17 feet -- four feet or so. Pallets are four by four,
18 according to Alan England. 40-inch estimate of one in
19 that position is incorrect. Full length of his trailer
20 is 48 feet. If he did walk the edge, he would hold onto
21 the pallet strap for balance. Confirms there were 14
22 pallets on his trailer, which was centrally and evenly
23 loaded.

24 He got up on the wheel, or with a

1 stepladder, or at the ICC rail. There was a two-foot
2 space, approximately. Truck next to him was loaded with
3 shingles. One part each side similar to his.

4 Q. Excuse me. He was telling you that the truck
5 next to him was how far away?

6 A. Two-foot space. Park area was holding 15 to
7 20 trucks at about 9:30 that day. Estimates the area was
8 50 feet by 300. On that day, the front gate was closed
9 for construction. The back gate was the only way in and
10 out this day. There was traffic going in both
11 directions. Confirms all loading is always done outside.
12 There were two loading areas using forklifts. Area one
13 in the front and area two in the back. Pull around into
14 the tarping tie down area same way. GAF forklift
15 operator lifted the tarp. Talk about some loads were
16 10-to 13-feet tall. Tarp was put up there by the
17 forklift operator. He unrolled it.

18 Q. If I can interrupt you, then.

19 Is he describing something happening at
20 GAF?

21 A. He's talking about general operations over his
22 30 visits.

23 Q. So, this business about loads 10- to 13-feet
24 tall, that was not something he was describing at GAF?

1 A. No. It could have been some loads that they
2 took out of there -- other truckers -- 10- to 13-feet
3 tall. But that was his -- some of his loads -- not all
4 were 14 pallets. They were more or less and higher and
5 lower and so. They varied considerably.

6 Q. Did he tell you that tarps were loaded or
7 lifted by forklifts at GAF?

8 A. Yes. Not all of the time. But some of the
9 time. However, he says they were at least helpful;
10 whereas, Alcoa would actively help you. He's talking
11 about Newburgh, Indiana, Reynolds and Ravenswood, West
12 Virginia. Leave it at Ravenswood. Also Alcoa Tennessee
13 plant. Six or seven loads per week. 3,500 miles per
14 week. Typically, he dropped the shingles and then
15 returned with an Alcoa load, including Alcoa boxside
16 plant and Texarkana.

17 Q. Let me ask you what this means. It looks like
18 you wrote 50/50 chance.

19 What does that refer to?

20 A. I'm trying to interpret that. That he would
21 be on top of the load, including occasions when the load
22 was twisted. That may be generally, not specifically,
23 with regard to the GAF plant the loading.

24 Q. In what context is this 50/50 chance he would

1 be up on the load? In what context? At what time? Or
2 doing what?

3 A. Well, certainly, for all tarping, he would be
4 on top of a load. But I don't know what this 50/50
5 chance refers to in terms of traveling from Plant A to
6 Plant B. But I think it relates to the fact he was
7 frequently on top of his load for whatever reason. And
8 he gives other reasons for that in the conversation.

9 Points out again the forklift operators
10 were not really social at the GAF plant.

11 Regarding the strapping that day, three
12 trucks were right against the concrete barriers. And
13 there was a central track in the 300 feet by 50 feet area
14 where all trucks went back and forth. This particular
15 sketch is going one direction, but the previous sketch
16 goes both directions.

17 There was some heightened risk. Hazard
18 of moving trucks. We talked about turning radius. I
19 think that's where I've done the sketch of that.

20 The other driver pulled next to Alan.
21 The note I made here is that the controlling employer was
22 GAF. And in that work area, there were no rules. There
23 were security in and security out. Paperwork shufflers.
24 Steel mills in the south were worse. At GAF, it took

1 30 minutes to load. And one to five hours, whatever that
2 means, to go through the plant.

3 Talks about his company, Builders
4 Transport and Spectrum Transportation, who dispatched
5 him. There was no rule books for drivers at GAF.

6 I did not understand the next question,
7 which relates to no shingles moved in bracket except the
8 ice underneath -- if ice got underneath. That's the end
9 of the conversation.

10 Q. It looks like you've written down Rick
11 Williams of Schilli Transportation and a Cell phone
12 number.

13 Who gave you that information?

14 A. Most probably, Mr. Foley.

15 Q. Do you remember anything else about this
16 conversation with Mr. England and Mr. Foley?

17 A. No.

18 Q. Did you say you had a third conversation with
19 Alan England?

20 A. Mum-hum.

21 Q. Could you locate that?

22 A. I believe so, from memory. It's on the 11th
23 of June of 2010.

24 MR. NYE: And if you don't mind, could

1 we have this marked as Exhibit 7.

2 And if you would like to take a quick
3 break.

4 THE WITNESS: Yes.

5 (Notes were marked as Ellis Exhibit No.
6 7 for identification.)

7 (Break was taken at, approximately,
8 10:30 a.m.)

9 (Back on the record at, approximately,
10 10:40 a.m.)

11 MR. NYE: Back on the record.

12 BY MR. NYE:

13 Q. These are your notes talking to Mr. England
14 on, it looks like, on June 11, 2010.

15 Am I right so far?

16 A. Yes.

17 Q. And was Mr. Foley in on that call, as well?

18 A. It does not look like it.

19 Q. From your memory or your notes or both, would
20 you, please, tell me what information or any new
21 information you got at the time from Mr. England?

22 A. Talked about the congestion of trucks, which
23 are a mixture of flatbeds and panel trucks. 80/20,
24 percentage wise, which we use for shipping out of the

1 plant.

2 This part doesn't look like it should be
3 part of a discussion with Alan England. It talks about
4 premises law. So, I think Mr. Foley may have been on
5 that call.

6 Is this the one we already did?

7 Q. I believe Exhibit 7 was just marked not too
8 long ago.

9 A. Okay. And this part of the conversation, I
10 believe, Mr. Foley must have been on the call.

11 Q. And he provided you with some opinions from
12 him on Indiana premises liability law?

13 A. Yes.

14 Q. Do you personally think that you are an expert
15 on premises liability law in the State of Indiana?

16 A. I'm not an expert. But I've been acquainted
17 with what the law is. So, therefore, if I were in
18 Indiana, I should be guided by the language of reasonable
19 care toward business invitees, which is similar in most
20 states anyway. And I do come up against it in every case
21 I do.

22 Essentially, my expertise is based on
23 whatever the premises law in that state is.

24 Q. But you're aware we have 50 states?

1 A. And I've been hired in every one of them as an
2 expert in fall cases.

3 Q. Other than speaking with Mr. Foley, what have
4 you done to investigate the law in Indiana on premises
5 liability?

6 A. Nothing.

7 Q. Have you consulted any statutes or legal
8 authorities regarding Indiana law?

9 A. Yes. I do have, somewhere on the table here,
10 I do have a summary of Indiana law in this area.

11 Q. Well, we'll get to that, then. Go ahead.

12 A. Keep on going?

13 Q. Yes.

14 A. I'm leaving out other aspects of Michigan,
15 sorry, Michigan City, but Indiana premises law,
16 concerning business invitees. There are other items
17 there.

18 How far should trucks be apart is one
19 question. And his opinion this day is four feet. They
20 talk about at what distance you have to move sideways
21 between two trucks. That appears to be two feet. Can't
22 walk straight. You have to go sideways.

23 Q. So, whose opinion is it that it should be four
24 feet?

1 A. His opinion.

2 Q. Do you have an opinion on that?

3 A. I don't have an opinion at this time on
4 whether it should be four feet. I think it should be as
5 much as possible so you can accomplish a work process of
6 strapping from the ground which is conveniently and
7 capably tossing a strap from one side of your truck over
8 the top of the load to the other side without endangering
9 yourself or another person, including another driver.

10 Q. Let's talk about that.

11 So, it's possible to, feasible, to strap
12 the load from the ground without getting up on the
13 trailer, the strapping itself.

14 Do you agree with that?

15 A. If there is special distances involved both
16 after headroom and also beyond the other side of your
17 truck so the arc can continue. Because as it touches
18 down, the strap is going to arc further to its pivot
19 point. You don't want it to be hung up on the side of
20 your truck so you have to climb up the truck to get it.
21 So, there's going to be headroom issues, which I don't
22 know if there's anything -- the question of here is
23 sufficient headroom. What's the question is the
24 inability for Mr. England to toss this strap and buckle

1 over the truck, such that it doesn't come into contact
2 with another truck, which happened to be parked close to
3 him that day.

4 Q. And what did he tell you was the distance
5 between his truck and the truck next to him?

6 A. I'm not sure whether already discussed that or
7 not. But it appeared to be -- I don't recall
8 specifically, but I believe it was less than two feet.

9 Q. And Mr. England told you that he thought he
10 needed four feet to be able to strap from ground level
11 without getting up on the trailer?

12 A. That was what he said, from what I understood
13 from what he said. That would be the minimum distance
14 apart. I got a sketch of this somewhere in my notes
15 anyway.

16 Q. We'll look at the sketch in a minute then.

17 Would you go ahead, then, with what you
18 can tell us about the conversation on June 11, 2010?

19 A. We're discussing the likelihood of walking rub
20 rail, as opposed to climbing the load. He has no
21 specific memory of which. But he's familiar at previous
22 times with doing both, depending on the circumstances.
23 He said he would walk on the load he climbed, if
24 necessary. If it was eight feet off the ground, more

1 likely to walk on top than to have three inches of rub
2 rail to walk on which might be slippery.

3 Q. So, if I understand you correctly, he didn't
4 recall whether he, at the time of his fall, was on top of
5 the pallets, or was on the rub rail?

6 A. That's correct. But thinks it's more likely
7 he was on top.

8 Q. I'm sorry. Go ahead.

9 A. Would regard himself as skilled throwing over
10 the truck, meaning the buckle.

11 Q. Is that another way of saying he's pretty
12 confident that if he had enough room, he could strap the
13 load without leaving the ground?

14 A. Yes. Talks about 80 percent of the time the
15 straps are below the tarps. The tarp goes on top of the
16 strapped load. The reason is to avoid tearing the tarp.

17 Q. Now, this is something I wanted to ask you
18 about.

19 Did he tell you that it was his
20 intention to tarp the load on the date of this fall?

21 A. I'm reasonably confident I can say the answer
22 is yes to that.

23 Q. Why only reasonably confident?

24 A. Because I don't see a statement yet that says

1 he was going to do it, actually do it. But it seems the
2 forms and the paperwork were such that he had to do it.

3 Q. But you haven't seen the forms and the
4 paperwork?

5 A. Not that I recall. I may have. But I don't
6 recall right now. I would have to look in the file.

7 Q. Well, here's your file. I don't see any other
8 paperwork relating to his load on the day of the
9 accident.

10 A. You checked this. I'm looking at some notes
11 here from Mr. Gadoury, which relate to a conversation he
12 has had with Mr. England, Alan England. Describes the
13 loading of the pallets on the truck -- on the trailer.
14 When I say truck, I really mean trailer.

15 Q. Right. I understand. I do the same thing.

16 MR. NYE: Since you're referring to
17 that, let's mark that Ellis 8.

18 (Set of E-mails were marked as Ellis
19 Exhibit No. 8 for identification.)

20 BY MR. NYE:

21 Q. Mr. Ellis, Exhibit 8 is a set of E-mails
22 between Chris Gadoury and yourself regarding Mr.
23 England's case?

24 A. Yes.

1 Q. I'm a little confused.

2 My impression from you earlier was Mr.
3 Gadoury's only input in this matter was to recommend your
4 services?

5 A. That's what I thought, too.

6 Q. Did he also speak to Mr. England and then
7 provide some information to you?

8 A. Apparently so, at the tail end of 2008.

9 Q. With that addition, Exhibit 8, did Mr. Gadoury
10 have any other input in the matter?

11 A. It looks like there were one or two calls.
12 That's about it.

13 Q. Did Mr. Gadoury represent Mr. England?

14 A. I don't know. I don't think so. I don't know
15 whether he's another expert or whether he's an attorney.
16 I just don't know. Maybe it's somewhere in the files
17 here. I've had no constructive discussion, other than
18 that one E-mail that you just saw with Mr. Gadoury. But
19 a summary of the discussion is I believe that Mr. England
20 was preparing to tarp that truck that day, at least the
21 trailer portion of the truck.

22 Q. Would it be more accurate to say you believed
23 he was intending to tarp it?

24 A. Isn't that what I just said?

1 Q. You said was preparing to.

2 My understanding from this deposition
3 is, whatever his intentions, he didn't get beyond -- he
4 didn't even complete strapping.

5 Do you agree with that?

6 A. Yes. I do agree. But intending is a better
7 word.

8 Q. You were explaining, or you were going through
9 your Exhibit 7, your notes of the conversation of
10 June 11, 2010?

11 A. Yes. It looks like another reason to get
12 higher up the load is edge protection is important when
13 strapping down shingles, pallets of shingles. It's very
14 easy to cut the shingles.

15 Q. But didn't Mr. England testify in his
16 deposition that he was able to put his edge protectors on
17 from the ground with a device that he purchased.

18 Isn't that true?

19 A. I think for the lower height loads, that's
20 true. But for the higher loads, which we weren't dealing
21 with this day, I think you have to get up there somehow
22 to do that.

23 Q. But the load he had on the day of his fall,
24 according to his testimony, he could put the edge

1 protectors in from the ground?

2 A. I concluded the same thing. We talked for a
3 while about coil loading, which is really an Alcoa type
4 of operation. We talked, again, about GAF loading of
5 shingles. Talked about pulling the tarp off the load so
6 he don't have to go up on the load when you're untarping.

7 Q. That would be at the point of delivery then?

8 A. Yes. I can't read the other portions of my
9 notes.

10 Q. Fair enough. Okay. I think we talked about
11 three telephone conversations with Alan England.

12 My impression is, those are the only
13 occasions that you have spoken with him.

14 Am I right?

15 A. Yes.

16 Q. Okay. I got the idea from your report that
17 you had also spoken to Mr. Rick Williams?

18 A. Yes.

19 Q. Are there notes of that conversation?

20 A. Yes.

21 Q. Could you find those, please?

22 A. May I put these in here.

23 Q. You're the best judge of where they go.

24 A. Dated the 10th of June of this year.

1 MR. NYE: Before we get started, if you
2 don't mind, we'll mark that as Ellis 9.

3 (Notes were marked as Ellis Exhibit No.
4 9 for identification.)

5 BY MR. NYE:

6 Q. Exhibit 9 are your notes from your
7 conversation with Rick Williams on June 10, 2010?

8 A. I think so.

9 Q. Was Mr. Foley in on that conversation? I see
10 his name there.

11 A. Well, the name on the left merely means it's
12 going to go in this file.

13 Q. Does that mean he was not a part of the
14 conversation?

15 A. It doesn't say he was. It doesn't say he
16 wasn't.

17 Q. What is your recollection? What can you tell
18 us?

19 A. My recollection is that at this moment Mr.
20 Foley was not on this call. It may have been a call from
21 him. But, I think, I had his phone number so I could
22 have made the call myself, or he could have called me, or
23 Mr. Foley could have made the call.

24 Q. Fair enough.

1 A. Whatever happened, I asked the questions.

2 Q. Fair enough.

3 And what information did Rick Williams
4 give you on June 10, 2010?

5 A. Right. Has been trucking, transporting
6 shingles for 20 years. You need a distance between the
7 trucks of four to six feet. Truck meanings trailers. If
8 you're an old man, you need to use a side kit. Two
9 words.

10 Q. Two questions.

11 What is a side kit?

12 A. A side kit is a bunch of two by fours and thin
13 plywood, which is slotted together to form a barrier
14 which can stay in place or be removed, depending on the
15 needs of getting the load off the truck. And it's a very
16 popular way of providing a side to the load for certain
17 types of goods. It does take up space. It does take up
18 part of the weight.

19 Q. The other question would be, we all have
20 different points of view, but in the context here of this
21 conversation, what's an old man?

22 A. I didn't dare ask. I didn't ask for a
23 detailed explanation of what an old man is.

24 Q. You wrote 48 years.

1 Is that how old Mr. Williams is?

2 A. 47 years is how old he was at the time. Yes.

3 Q. From the context of the conversation, did Mr.
4 Williams seem to classify himself as an old man?

5 A. No.

6 Q. Did he use a side kit?

7 A. No.

8 Q. Mr. England is about ten years older. He was
9 59 when he had his accident.

10 Is he an old man for these purposes?

11 A. I did not go into that discussion. But I
12 might have concluded that he was thinking that an older
13 person should have a different system.

14 Q. Why?

15 A. I didn't make that conclusion. But I thought
16 he was trying to make that conclusion.

17 Q. Meaning, Mr. Williams thought of Mr. England
18 as in the old-man category?

19 MR. FOLEY: Let me just object. I think
20 you're asking him to speculate, aren't you, Randy, what's
21 in someone else's mind?

22 MR. NYE: I'm asking about the context
23 of the conversation.

24 MR. FOLEY: Speculative.

1 BY MR. NYE:

2 Q. Let's put it this way. You've had more
3 experience with the trucking industry than I.

4 Fifty-nine is well beyond the median age
5 of truck drivers?

6 A. Well, somewhere in this conversation, in fact,
7 down here bottom of that page, he's saying he knows
8 people who drive flatbeds who are 80-years-old. So, I
9 guess, if you have trucking in your blood, you're going
10 to do it as long as you can physically move around.

11 Q. But generally speaking, 59 is older than
12 average?

13 A. I didn't make any conclusions at all with
14 regard to the situation at hand and the fact he says he
15 knows 80-year-old drivers who use side kits. And to
16 never take them off is a way to work longer from his
17 experience.

18 Q. Let's go ahead and talk about this
19 conversation.

20 Again, what information did Rick
21 Williams give you on June 10, 2010?

22 A. Flatbeds are typically a young man's job.
23 Backing into a dock. And drive the forklift down onto
24 the flatbed is a way of working side kits. Talks about

1 turning his truck and trailer around. 150 flatbeds every
2 day. 20 trucks there at the time, estimate. Takes one
3 hour to get through and takes 15 minutes for him to tie
4 down. "They," meaning the forklift operators, will put
5 up your tarp. He had a 150-pound tarp. Although, he is
6 saying his preference was for small tarps, 25 to
7 30 pounds each.

8 Q. Is he telling you that GAF operators, forklift
9 operators will put the tarps up on the load for you?

10 A. Yes. Yes. Upon request. And I assume he was
11 talking about the GAF plant. It is common practice
12 nationwide to ask the forklift operators to do that for
13 you.

14 Heard him fall as he hit the ground. He
15 ran around and saw him. Went and got security. He
16 usually climbed on top of the load, not walked around.

17 Q. To do what?

18 A. Sometimes to put edge protectors. He gets to
19 load now and again, but not in this case. His trailer
20 was 102-inches wide. Alan's was 96-inches wide. Maybe
21 three-inch rub rail beyond that.

22 Q. If I could go back, if you don't mind.

23 I understand Mr. Williams told you he
24 gets on his load now and again, but not, what's that, not

1 in this case?

2 A. Not in this case. Talking about himself.
3 There was no stacking of pallets. Each pallet was
4 four-feet tall. If you have two pallets one on top of
5 each other, you would be 12 feet, plus the height from
6 the ground. Eight plus four is just over 12. Got
7 maximum of 13-and-a-half feet with maximum height of your
8 truck, trailer.

9 Q. But what Williams is telling you, on this
10 occasion, this place, there's only one --

11 A. He's talking about his own truck. He didn't
12 get on the load in this case.

13 Q. Meaning, GAF that day, his truck with the
14 single roll of a layer of pallets, he would not get on
15 top?

16 MR. FOLEY: When he said he did not do
17 it in this case, in this instance, he didn't get on his
18 own truck in this instance.

19 THE WITNESS: Right. He got on top of
20 it now and then, but not in the case.

21 BY MR. NYE:

22 Q. "He" meaning Williams?

23 A. "He" meaning Williams. He said he got there
24 first, but then he changed that to he may be wrong.

1 There were lots of concrete barricades around. He
2 recollects that he pulled in first after another truck
3 pulled out. He was intending to go park, then strap then
4 tarp.

5 Now, the process is to go in one way and
6 come out another way. Then that day he had to circle and
7 go back in the same area. They were, apparently,
8 building a new security building. Alan's truck had four
9 feet on top of the trailer; in other words, it was about
10 eight-feet tall.

11 Q. Meaning a single layer of four-foot pallets?

12 A. Yes. Were there any rules, not at GAF,
13 affecting the drivers. That was the end of the
14 conversation with Mr. Williams.

15 Q. So, Mr. Williams told you that he heard Mr.
16 England fall?

17 A. Yes.

18 Q. Had he seen Mr. England before then?

19 A. Did not ask that question.

20 Q. Had he spoken with him before that?

21 A. The answer is, I don't think so.

22 Q. Had Rick Williams begun strapping his load at
23 the time that Mr. England fell?

24 A. Yes. He says that he was either strapping or

1 tarping. I can't remember which he said. I don't think
2 I have any note of that. But he was working on his
3 truck.

4 Q. Can you read that for me, please?

5 A. It appears to say taller loads elsewhere, for
6 example, drywall.

7 Q. Discussing loads somewhere other than GAF?

8 A. Yes.

9 Q. Could you read that for me, please?

10 A. Back in dock. Drive on end with forklift.

11 Q. It looks to me, if I can read your
12 handwritten, it looks like move truck, question mark.

13 Am I reading that correctly?

14 A. Yes.

15 Q. What did you mean by that?

16 A. I don't know.

17 Q. And what is the line below that?

18 A. I seem to be trying to investigate whether or
19 not Mr. England's truck was trapped in traffic, part of
20 traffic. And I don't think I got an answer.

21 And the next line, which is not related
22 to the line previously on the truck, moving the truck.
23 There's nobody in front of his truck. I don't know why.
24 It must have come up in the conversation.

1 Q. Does nobody mean no truck was parked in front
2 of it or no people were there or what?

3 A. I don't know.

4 Q. It looks to me if I read this correctly,
5 quote, Got up in front and walked around, close quote?

6 A. Yes.

7 Q. What do you mean by that? Who got up and
8 walked around?

9 A. I don't know. He certainly didn't see Mr.
10 England until he heard the fall, impact, and then went
11 around and saw his legs.

12 Q. I noticed you wrote GAF Mt. Vernon there.
13 Did Mr. Williams talk about the GAF
14 plant at Mt. Vernon, or what?

15 A. It came up. I don't know what comment he made
16 about Mt. Vernon.

17 Q. I see the word Kevin here.

18 Who is Kevin?

19 A. I don't know.

20 Q. It says, Kevin, am I reading this correctly,
21 Kevin, landlord owes a duty of care?

22 A. Yes.

23 Q. No idea who Kevin is?

24 A. No. Not at this moment. No. Kevin's

1 research is pointed to the next line. I guess, maybe,
2 that's Mr. Foley's assistant.

3 MR. NYE: Is it right, Ed?

4 MR. FOLEY: I have an associate named
5 Kevin. He has done some research for me. But I don't
6 remember him ever talking to you.

7 THE WITNESS: He may not have.

8 MR. FOLEY: Okay.

9 MR. NYE: Okay. Thank you.

10 MR. FOLEY: May I look at those real
11 quick, too, Randy. Thanks. This writing is worse than a
12 doctors.

13 MR. NYE: That's harsh.

14 THE WITNESS: My father was a doctor.
15 Maybe I have his genes.

16 MR. FOLEY: Well, you're a doctor. I
17 guess it fits in.

18 MR. NYE: Architects have excellent
19 handwriting. They print. So, it's legible.

20 THE WITNESS: No sense of safety.

21 MR. FOLEY: A friend of mine I mentioned
22 is an architect.

23 BY MR. NYE:

24 Q. So, that's the only conversation you had with

1 Rick Williams?

2 A. True.

3 Q. Have we discussed every conversation that
4 you've had with either Alan England or Rick Williams?

5 A. Yes.

6 Q. Have you had any other sources of information
7 that we haven't discussed here?

8 A. Not that I'm aware of.

9 Q. And Exhibit 3 is a list of cases in which you
10 have given depositions or court testimony?

11 A. Yes.

12 Q. Is this complete? Are there any other cases?

13 A. I'm reliant on my assistant.

14 Q. As far as you know, is it complete?

15 A. I don't know the answer to that question. I'm
16 hoping it's accurate.

17 Q. Was your assistant directed to prepare a
18 completed list?

19 A. She keeps the list.

20 Q. I've read different things in your report.
21 Here 20 inches. Other things.

22 Did you come to any conclusion as to the
23 distance between Rick Williams' truck and Alan England's
24 truck?

1 A. In what way, physically, you mean, or because
2 of...

3 Q. Yes. Somebody wrote 20 inches. I've seen two
4 feet.

5 What is your conclusion in that regard?

6 A. Well, it wasn't enough to toss a buckle on a
7 strap over conveniently for Mr. England.

8 Q. But how far?

9 A. I have an interesting sketch some place, which
10 maybe we should find, which would help. Answer my
11 approach to that area. It's a variable approach. It's
12 in here somewhere.

13 Here is the sketch. (Indicating.)

14 MR. NYE: Could you mark that, please.

15 (Sketch was marked as Ellis Exhibit No.
16 10 for identification.)

17 BY MR. NYE:

18 Q. It's kind of implicit in the conversations
19 that we've had that you've never been to the Michigan
20 City plant of GAF?

21 A. True.

22 Q. Is Exhibit 10 the diagram or your sketch that
23 you were just referring to?

24 A. Yes.

1 Q. Would you explain this, please?

2 A. Taken or drawn from the position of being at
3 the back, the rear of the truck, maybe even the front,
4 not discounting the truck itself, shows an individual
5 lobbing an object over the top of the loaded truck. In
6 this case, it would be shingles packed over a four-foot
7 wide pallet. It shows you the alternative ways of how it
8 might be thrown. I haven't actually reconstructed that
9 to check how good Mr. England was. But his opinion was
10 that it was not satisfactory to throw it into a gap he
11 had available, whatever that was.

12 Q. Do you have an opinion on what that gap was
13 between the truck?

14 A. Not specifically, no. It was insufficient. I
15 think both Rick Williams and Alan England would agree
16 with that.

17 Q. Have you watched truck drivers throw straps
18 over loads of shingles?

19 A. Yes.

20 Q. When Alan England was throwing his strap over,
21 was it just a strap? Was there a metal buckle attached
22 to the end that was being thrown or not?

23 A. Well, I regarded it was a standard practice.
24 The webbing strap could be two- or three-inches wide or

1 30-thick webbing. And the buckle would be to attach to
2 the load binder there on the other side.

3 Q. So, you would expect there to be a buckle on
4 the end of the strap, the end that is being thrown over?

5 A. Yes.

6 Q. Could we look at your report, Page 4. Under
7 the subheading The Hazard, Item No. 1.

8 A. The Hazard - background?

9 Q. Yes. The Hazard - background, that
10 subheading.

11 A. Yes.

12 Q. Item No. 1. You give some statistics there
13 for fatalities from falls?

14 A. I do.

15 Q. You refer to the construction industry?

16 A. Yes. And then I refer to all occupational
17 deaths.

18 Q. What are you saying, that 33 percent of
19 fatalities in the construction industry are from falls?
20 Is that what you're saying?

21 A. A third of the deaths at work in construction
22 are from falls. That's correct. That's one statement.

23 Q. But Mr. England was not working in the
24 construction industry; was he?

1 A. That's true.

2 Q. You say that industry deaths represent
3 14 percent of all occupational deaths?

4 A. Yes. Which would include Mr. England's type
5 of work.

6 Q. But it would include all occupations?

7 A. That's correct.

8 Q. Which is more and less hazardous than
9 strapping a truck?

10 A. A person could have been strapping a truck and
11 been killed once. But if it existed, it would be in that
12 statistics.

13 Q. All occupations, roofers, whatever?

14 A. HVAC. Everything.

15 Q. Did you look at, or are you aware of any
16 statistics or data with regard to deaths from occasion in
17 the course of strapping trucks?

18 A. No. But I broaden that to say flatbeds.
19 Okay. Flatbeds, in general, would take into account
20 strapping.

21 Q. And what data is there?

22 A. It is very low. But it is low for one reason.
23 After discussion with BLS, loads, quite conceivable, the
24 very person that should be reporting such deaths of

1 falling off of a flatbed truck are people who have been
2 killed. There is such an amenity of owner/operators in
3 this country, sole employees, they don't get around to
4 reporting their own death.

5 Q. So, you're saying the deaths from --

6 A. In the trucking industry.

7 Q. Don't get reported?

8 A. Sixty deaths are unreported each year based on
9 my rough calculations.

10 Q. Are reported or are unreported?

11 A. Unreported.

12 Q. Are you speaking of deaths resulting from,
13 what, a fall from a flatbed truck?

14 A. Falls from the load or the surface of flatbed
15 truck, flatbed trailer.

16 Q. Can you break that down between strapping and
17 tarping?

18 A. No.

19 Q. Would it include both strapping and tarping?

20 A. It would include any operation involving
21 height and a flatbed trailer.

22 Q. You say these deaths are unreported.

23 Where does the number come from?

24 A. I did a calculation. The injuries are well

1 reported, and they're consistent with other industries.
2 But trucker death involving flatbeds are very low because
3 they're underreported because the death of the
4 owner/operator, who is the owner of his own one or two
5 flatbeds, is unable to report his own death.

6 So, I did it based on comparison of
7 statistics injuries to death. The typical number of 300
8 to 1 injuries to death in industry, from industry to
9 industry.

10 Q. On these calculations, could you provide Mr.
11 Foley with a copy of it?

12 A. I would possibly have to re-research that, but
13 I could do that. Yes.

14 Q. When did you do this?

15 A. In the last two years.

16 Q. Was it published?

17 A. I have published it. And I have reported it
18 in presentations to the National Safety Council and/or
19 the American Society of Safety Engineers.

20 Q. Well, if you published it, isn't it already in
21 written form?

22 A. In Powerpoint form. It will be on my website.

23 Q. Which is more dangerous, tarping or strapping?

24 A. Tarping is definitely more dangerous and

1 hurtful to your body than strapping overall.

2 Q. Can you quantify that?

3 A. No. There are so many different scenarios
4 that arise. A low ceiling. Trucks parked close to each
5 other. A wall. Strapping which is normally done by
6 tossing a buckle on the end of the piece of webbing over
7 top of a truck trailer is -- sometimes you have to
8 improvise. So, it's a well-recognized issue that falls
9 within the tarping area, which is consistently almost
10 every truck, and you treat it from a policy point of
11 view, as any work done at height by a truck operator must
12 follow certain rules. So, you apply that to your own
13 truckers, and you apply it to independent truckers.

14 Q. Strapping, it can be done from the ground?

15 A. Normally.

16 Q. And as long as it is done from the ground,
17 there's not going to be any fall?

18 A. That's correct. Not enough to account for,
19 unless it's icy or has other slippery conditions. The
20 owner should keep the lot where you're expecting work to
21 be done by his own drivers or by independent drivers,
22 should keep it free of hazards.

23 Q. The Alan England case, any hazards on the
24 surface?

1 A. There did not appear to be. It was a dry day.
2 So, what could have been the case one day was not the
3 case that day.

4 Q. In your report of the same page, Page 4, The
5 Hazard - found here, that subheading?

6 A. Mum-hum.

7 Q. You make a reference to premises law calls for
8 protection of invitees.

9 Would you agree that Indiana law -- they
10 govern this issue?

11 A. Yes.

12 Q. I'll state what's obvious, you haven't been to
13 law school?

14 A. I have. Just up the road.

15 Q. What law school did you attend?

16 A. I attended for one semester at Widener Law
17 School.

18 Q. Is this on your resumé, or did I miss it?

19 A. It may be. But I'm not sure. It may be.

20 Q. What is the name of the law school again?

21 A. Widener. Abbreviated it could be called The
22 Delaware Law School. W-I-D-E-N-E-R.

23 Q. And when was this?

24 A. Probably five- or six-years-ago.

1 Q. Was it your intention to get a law degree?

2 A. It was to be admitted to law school for
3 evening classes.

4 Q. How many classes did you take?

5 A. Three.

6 Q. And what were they?

7 A. Agency, remedies and writing, I believe.

8 Q. Writing?

9 A. Yes. Agency, remedies and writing.

10 Q. Referring to that version of the intellect of
11 legal writing?

12 A. Correct.

13 Q. Those are the only law courses you've ever
14 taken?

15 A. Yes.

16 Q. None of those courses, from the sounds of
17 things, would have anything to do with premises liability
18 law?

19 A. Why not? Remedies applies. Agency applies
20 here. But in terms of its applicability to this case,
21 obviously, I've been involved with thousands of fall
22 cases of every description. And I'm not applying law,
23 but I'm reasonably familiar with concepts of laws as the
24 attorneys that I'm working for bring them to my

1 attention.

2 Q. Do you have an opinion on whether Mr. England
3 was an invitee or licensee under Indiana law?

4 A. I don't know the answer to that question
5 technically. I believe certainly he was an invitee. He
6 had been many times. Okay. He wasn't thrown out of the
7 plant.

8 Q. What do you mean you don't know the answer
9 technically?

10 A. Well, because I know he was an invitee. They
11 may be one in the same thing, as far as I know. The
12 invitee, he certainly was.

13 Q. Can you define the difference between an
14 invitee and a licensee under Indiana law?

15 A. No.

16 Q. Can you define the duty of a landlord -- I'm
17 sorry -- the owner or occupier of land in Indiana to an
18 invitee?

19 A. I believe the risk -- the presumption of a
20 duty that an owner of a property has to invitees who may
21 not recognize hazards. And if they did, they may not do
22 anything about them on the property.

23 Q. What is that duty?

24 A. The duty is to provide a safe place to visit.

1 Reasonable care.

2 Q. Have you consulted any or looked at any
3 Indiana case or any Indiana statute that relates to
4 premises liability law?

5 A. I have. There is a document somewhere in the
6 proceedings here which I saw last night which relates to
7 that.

8 Q. So, what did you look at?

9 A. Let me see if I have it.

10 MR. FOLEY: I need to check out. It's
11 almost noon.

12 MR. NYE: Let's take five minutes or so.
13 (Off the record at, approximately, 11:45
14 a.m.)

15 MR. NYE: Back on the record.
16 (Back on the record at, approximately,
17 12:00 p.m.)

18 THE WITNESS: So, the answer to your
19 question is that the document must be still on my office
20 table, which relates the summary of Indiana premises law
21 at home.

22 BY MR. NYE:

23 Q. Weren't you asked to bring your complete file
24 here?

1 A. I intended to bring everything.

2 Q. Who prepared this summary of Indiana premises
3 liability law?

4 A. I don't know.

5 Q. Did you prepare it?

6 A. No.

7 Q. Anything else you did not bring with you that
8 relates to this case?

9 A. Not that I'm aware.

10 Q. On the same page, Page 4, you make the
11 statement that OSHA Section 5(a)(2) requires the
12 controlling employer, in this case GAF, to provide
13 protection to its invitees.

14 My understanding is 5(a)(2) directs
15 entities to comply with regulations?

16 A. True.

17 Q. You refer to two specific regulations there.
18 OSHA 1910 and 1926.

19 Are there any other specific OSHA
20 regulations that you believe apply to Mr. England's
21 truck?

22 A. I've used the consensus standards, ANSI
23 Z359.1.

24 Q. ANSI, that's not a government regulation.

1 Correct?

2 A. That's true.

3 Q. We'll get to that. But I would like to talk
4 about one thing at a time.

5 A. But under general duty, you have to use a
6 recognize standard in the industry to support the
7 5(a)(1).

8 Q. Let's put it this way.

9 You reference here two ANSI standards
10 and two OSHA standards.

11 Are there any other --

12 A. They are bodies of standards, really. 1910 is
13 a body of general industry standards, which, if it exist,
14 it would follow this kind of case, if OSHA chose to
15 prepare a citation against the owner. And 1926 also is a
16 body of knowledge, which could be applied.

17 Q. Are there any others that you believe are
18 applicable here?

19 A. No. This covers pretty much. There may be
20 some other ANSI standards that I have not included, but I
21 think these two are the most important.

22 Q. Let's focus on OSHA for a while, then we'll
23 get to ANSI.

24 A. You're focusing on ANSI, which is a

1 recommended set of standards. They could be cited as
2 part of general duty. OSHA citation.

3 Q. Well, I'm just talking about one thing at a
4 time, if you don't mind.

5 A. Go ahead.

6 Q. My understanding is that OSHA Section 1926 is
7 a set of rules for construction industry.

8 Am I right?

9 A. That's typically the way it's used.

10 Q. But Alan England was not working in
11 construction?

12 A. That is absolutely true.

13 Q. And 1926, therefore, does not apply, or
14 doesn't require anything of GAF, in this instance?

15 A. It's a body of knowledge that GAF and any
16 other reasonable employer would use to formulate its own
17 rules on site affecting not only its own employees, but
18 also employees who are invitees, which could be
19 owner/operators like Mr. Alan England.

20 Q. Are you saying that 1926 required anything of
21 GAF?

22 A. No. It's a body of knowledge that a wise
23 employer, somebody who has been in business for many
24 years, and is interested in providing a set of rules or

1 policies for independent drivers and its own drivers as
2 employees could have pulled from that body of knowledge
3 to create a set of rules for safety, if they had chosen
4 to do so.

5 Q. I understand what you're saying.

6 But OSHA would not cite GAF for not
7 following 1926 with regard to --

8 A. Probably not. Unless there were some
9 extenuating circumstances involving construction in an
10 area, or a truck had come through an area in the front of
11 the building, which was being reconstructed at the time.
12 But there was no such evidence for this particular case.

13 Q. Not on this day, this truck?

14 A. That's correct.

15 Q. Okay. I want to ask you the same with regard
16 to Section 1910.

17 Is there anything specific in there that
18 applies to loading and unloading trucks?

19 A. Not that I have seen. But the overall
20 standards would apply to edges and falls that occur at
21 several locations within the 1910 section.

22 Q. Here again, it's simply a set of standards
23 that could be followed by a landowner or employer?

24 A. It is. It's a place which is law in its own

1 right and has been in existence for many years. It's not
2 like it came yesterday, or the day before this incident.
3 And it could have been years to create a set of policies
4 that would apply to what invitees would do in this plant,
5 whether they should wear hardhats, whether they should
6 wear gloves, whether they should be mindful of fall
7 hazards, what they should do if a fall hazard, such as
8 tarping, or such as climbing on the truck or the load for
9 any reason, what they should do for safety, which most
10 plants in this country of any size do have currently and
11 have had for many years.

12 Q. But for Alan England's truck on the day and
13 place where he was hurt, there's nothing specific that
14 would required any particular fall standard?

15 A. That's true. GAF never created the rules for
16 visitors to its plant that could include Mr. Alan
17 England.

18 Q. So, it's a set of rules, or a body of concepts
19 that could be used to create rules, but not binding on
20 GAF legally?

21 A. I think very definitely binding on GAF legally
22 when it comes to premises law. These rules were not with
23 one company. They were with hundreds of companies
24 nationwide. We've already seen Alcoa have these rules in

1 effect. You wouldn't be handed these rules when you came
2 in the gate through security. Do this, don't do that.
3 When you're at height, use the tarping station. Don't
4 climb on the truck unnecessarily. Don't go to any
5 lengths to expose yourself to a height over four feet,
6 which is the general industry rule out of the 1910
7 regulations, which have been generally accepted by plants
8 nationwide.

9 So, there very definitely would be some
10 rules that should have been set up and policies that
11 should have been set up for drivers like Mr. Alan England
12 to guide him on safety on the premises.

13 Q. But 1910, there's nothing in there that could
14 be the basis for an OSHA citation against GAF?

15 A. We're not talking about employees. We're
16 talking about simply a set of rules that would apply to
17 invitees under premises law in Indiana on the day of Mr.
18 Alan England's visit on the site where he was injured.

19 Q. My question was, anything in 1910 that could
20 serve as the basis for an OSHA citation against GAF with
21 regard to Mr. England's strapping, his strapping, what he
22 was doing with his truck, loading of his truck on the
23 date of the accident?

24 A. There could have been. I don't think there

1 was. There wasn't an OSHA violation. But they could
2 have applied 5(a)(2) to his situation if they had so
3 chosen. If he had been killed, there may have been a
4 better chance of a citation which we're talking about.

5 Q. 1910 has a lot of stuff in it.

6 Right?

7 A. Yes.

8 Q. Can you tell me anything in there specifically
9 that relates to loading and unloading of trucks?

10 A. No. Loading and unloading trucks is one form
11 of exposure. Not even the loading process. We're
12 talking about the tarping process or the strapping
13 process here of what gives rise to a height hazard.
14 Certainly, Mr. England, without dispute, is over four
15 feet above the ground, which does invoke some aspects of
16 the general industry rules. It is four feet in general
17 industry and six feet in construction, generally.

18 So, we could have taken that four-foot
19 rule out of general industry and applied it to a set of
20 policies that would be applicable to Mr. England when he
21 was doing the work of any kind over four feet.

22 Q. I don't think you're answering my question,
23 which is, is there anything in 1910 that specifically
24 relates to loading and unloading trucks?

1 A. Not that I've seen.

2 Q. Let's look back to 1926. I read from part of
3 your record, and you state in there 1926.500 exempts
4 vehicles or trailers from the requirement of fall
5 protection and the trigger height is six feet.

6 Is that still true?

7 A. Yes. As it applies to employers and
8 employees.

9 Q. With regard to the ANSI standards there that
10 you refer to in your report, you refer to Z359.1.

11 My understanding is that standard
12 provides guidance on how to provide fall protection, if
13 one wants to do it, needs to do it.

14 Is that a fair statement?

15 A. Yes.

16 Q. Is there anything in that standard that
17 specifically relates to truck loading, unloading,
18 strapping?

19 A. There's no reference to any application of
20 products or systems. It really relates to, if you want
21 to create a fall protection system because you know you
22 have a fall hazard of any kind whatsoever, then here is a
23 place to find how to build that system and what standards
24 that it should meet. Once you decide that there is a

1 hazard of tarping, for example, then that is the place to
2 go to provide a fall protection system criteria for that
3 system that you choose to apply.

4 Q. But no reference to loading and unloading
5 trucks?

6 MR. FOLEY: I think the standard would
7 speak for itself, wouldn't it, Randy? Aren't you just
8 asking him to relate to you what the standard states?
9 Doesn't that speak for itself?

10 MR. NYE: Well, he's discussing his
11 report. I think I'm entitled to ask about it.

12 BY MR. NYE:

13 Q. My question is, does ANSI Z359.1 have any
14 reference to loading or unloading trucks or strapping
15 trucks or tarping trucks?

16 MR. FOLEY: Same objection.

17 THE WITNESS: There's no reference to
18 any application of fall protection in any of the ANSI
19 Z359 standards.

20 BY MR. NYE:

21 Q. So, the answer is, no, it doesn't make any
22 reference?

23 A. That's correct.

24 Q. You also referred there to the ANSI standard

1 No. A1264-1?

2 A. Dot 1.

3 Q. Dot 1. Pardon me. A1264.1.

4 I've looked at that, and as I read it,
5 it says in the scope, when describing its scope, that it
6 expressly excludes loading and unloading of trucks.

7 Do you agree?

8 A. If you read that there, then I certainly would
9 agree with that, as it specifically states at that
10 particular scope and point in the standard.

11 But the other points of the standard,
12 relative from a protection point of view, such as pulling
13 up catwalks and railing heights, and other types of
14 structure, which a truck would back into, and you would
15 then be able to do your strapping, tarping from the safe
16 area of a catwalk, at a height of, let's say, eight feet
17 or four feet, as the case may be, you would very
18 definitely pull from that standard how to build a catwalk
19 for such protection that you may deem as effective in
20 your operation.

21 Q. I have it here somewhere.

22 Do you agree that the written standard
23 expressly states in describing its scope that it does not
24 apply to loading and unloading trucks?

1 A. If you want to quote from it, I will stipulate
2 to that, if that's what the standard says. But my
3 previous answer stands. If you want to build a catwalk
4 to do operations around trucks, then you get your
5 guidance from A1264.1.

6 Q. Well, do you agree or disagree, I can find it
7 for you, if you want, and you referred to it in your
8 report --

9 A. You should. You should. We're dealing at
10 cross purposes here with that question.

11 MR. FOLEY: Do you want to mark that,
12 Randy?

13 MR. NYE: Well, he agrees with it.
14 Maybe we might as well.

15 Can you mark that.

16 (ANSI/ASSE A1264.1: Background Materials
17 was marked as Ellis Exhibit No. 11 for identification.)

18 MR. FOLEY: Could you identify, Randy,
19 what is Exhibit 11?

20 MR. NYE: Something I printed out from
21 the website, American Society of Safety Engineers. ANSI
22 A1264.1. I'll show it to you.

23 MR. FOLEY: Is it the actual standard,
24 or is it a summary from the website?

1 MR. NYE: Summary.

2 MR. FOLEY: It's not the actual
3 standard.

4 MR. NYE: It's what I printed out from
5 the website.

6 THE WITNESS: I can have a copy of the
7 standard faxed to you.

8 BY MR. NYE:

9 Q. Anyway, I read this to say, excluded from the
10 standard are, among other things, the loading and
11 unloading of trucks, railroad and marine docks,
12 self-propelled, motorized equipment and some other
13 things.

14 Do you agree?

15 MR. FOLEY: Let me just, for the record,
16 object. This, apparently, is not the specific ANSI
17 standard. This, apparently, is an interpretation from a
18 website that Randy took from some source.

19 So, to the extent you're asking him
20 whether or not that document, Exhibit 11, says what
21 you're indicating it says, I have no objection. But to
22 the extent you're asking him to relate that to the ANSI
23 1264.1, specific standard, my objection would be that the
24 standard speaks for itself.

1 THE WITNESS: Yes. I think in your
2 statement you were correct. But you did not add the last
3 part of the sentence, which is what the purpose is aimed
4 at, which is for the purpose of providing walk access to
5 a product off of construction work areas. And certainly,
6 I agree with that. We're not providing actual walking
7 access using the A1264.1 to the bed of a flatbed trailer.

8 However, that does not conflict with my
9 assertion that the standard can be used to build a
10 catwalk out to the edge of the truck for the purpose of
11 providing an access as appropriate over the railing of
12 the catwalk attempting to walk for purpose of tarping,
13 strapping, other such means in the normal course of
14 preparing a truck for the highway.

15 BY MR. NYE:

16 Q. Of course one can do anything. One can follow
17 anything. I'm asking about the standard.

18 Do you agree that the scope of the
19 standard does not apply to trucks, to, what's the term
20 used, loading and unloading areas of trucks?

21 MR. FOLEY: Same objection.

22 THE WITNESS: But you got to finish the
23 sentence. Unloading and loading of trucks for the
24 purpose of providing walk access to a product. I'm

1 saying I'm not disagreeing with that. But what I am
2 saying is, if you want to build a catwalk goes up to, but
3 doesn't allow you on the vehicle, then the standard would
4 apply.

5 BY MR. NYE:

6 Q. Is it your opinion --

7 A. A finger dock is used in the terms of this
8 standard. Building a finger dock, you would absolutely
9 go to this standard. But you're not providing access
10 onto the bed of a truck, which is what that statement
11 says. So, I agree.

12 Q. Is it your position that this standard A1264.1
13 applies to loading and unloading of areas of trucks? Yes
14 or no?

15 A. No, the way that you've expressed your
16 question. You're not addressing the issue of finger
17 docks. Finger docks is how you would go -- is a go-to
18 standard for preparing a finger dock.

19 Q. In this case, there was no finger dock?

20 A. There was no finger dock. Could have been a
21 finger dock. It could have been a great idea.

22 Q. Are you saying this A1264.1 would apply to a
23 finger dock?

24 A. Yes.

1 Q. Okay. At the GAF plant in Michigan City,
2 there was no finger dock?

3 A. That's correct.

4 Q. Something we can all agree on?

5 A. Unfortunately, that's the truth of the matter.
6 There was no protection, fall protection of any kind at
7 the GAF plant in this case.

8 Q. If we can focus on my question, which is,
9 given that there was no finger dock, does ANSI A1264.1
10 apply to the Michigan City facility?

11 A. Absolutely. It applies to, probably, dozens
12 of locations in the GAF facility in Michigan City. And,
13 in particular, if GAF had chosen to provide protection of
14 any kind for workers, and they chose the finger docks,
15 which are at other GAF plants, notably in the Baltimore
16 plant are finger docks, that they could have pulled the
17 standard how to built a catwalk to go around the area
18 that a truck would back into, or drive through, then,
19 that would have been the standard to go to.

20 Q. So, it's a standard for catwalks?

21 A. Yes. Catwalks and walk areas that are
22 self-contained.

23 Q. If one --

24 A. Builds a catwalk in that scope. Yes. That's

1 what it's for.

2 Q. So, this is simply a source one can use for
3 guidance in preparing a catwalk?

4 A. Catwalk and finger dock. Correct. We would
5 not be stepping from the catwalk onto the flatbed truck
6 by this standard. That's correct.

7 MR. FOLEY: Can I see that, Randy?

8 MR. NYE: Yes.

9 BY MR. NYE:

10 Q. We discussed the scope of this regulation?

11 A. Of the standard.

12 Q. Standard. You're right. It's not a
13 regulation.

14 ANSI is an acronym for American Society
15 of Safety Engineers?

16 A. No. ANSI is the American National Standards
17 Institute. And the organization that host this
18 particular standard is the American Society of Safety
19 Engineers.

20 Q. These are private organizations. They're not
21 governmental bodies?

22 A. The American National Standards Institute is a
23 recognized standards body that provides the American
24 government representation to the International Standards

1 Organization out of Geneva. So, it has quasi
2 governmental status. The U.S. Government is delegating
3 its membership to the American National Standards
4 Institute. There are tens of thousands of ANSI
5 standards. Most of them are recommendary standards.
6 Occasionally they are picked up into law as was the ANSI
7 A117 Disabilities Standard before it became law.

8 Q. The ANSI standards that you've referred to,
9 they have not been made into law?

10 A. The ones I have been referring to have not
11 been made into law by the Federal Government.

12 Q. Are you saying they were made into law by the
13 government of the State of Indiana?

14 A. I don't know the answer to that question. I
15 don't think so. I think Indiana is maybe a federal state
16 referring to OSHA matters. At one time, Michigan adopted
17 an ANSI standard for fall protection, but not currently.
18 And that may be so from other standards or other states,
19 too.

20 Q. But not the Federal Government and not
21 Indiana?

22 A. I believe that's true.

23 Q. We talked about the scope.

24 Are there any specific standards within

1 A1264.1 that discussed loading and unloading trucks?

2 A. At this time throughout ANSI, including the
3 Z15 trucking standards, there's no mention of loading or
4 unloading at this time, specifically.

5 Q. Continuing on, Page 4 of your report, the next
6 item under the subheading The Hazard - found here, Item 3
7 you say, quote, The danger of falling is not appreciated
8 by truckers and they do not have the capacity to protect
9 themselves, close quote.

10 What's the basis for this statement that
11 the danger of falling is not appreciated by truckers?

12 A. What I'm saying here is that safety is not
13 intuitive. Safety must come from a set of rules, which
14 are then applied. So, you have to have enforcement. If
15 someone does not follow your rules, does not use your
16 finger dock, or your fall protection system, then you
17 have the right to exclude them from the plant or notify
18 the direct employer of the violation of your rules.

19 Q. Well, what you're saying is in this sentence
20 is that the danger of falling is not appreciated by
21 truckers.

22 What do you mean by that, that they
23 don't understand they can fall?

24 A. It's really not so much they don't understand

1 that they can't, they can or can't fall. But they don't
2 understand the consequences of falling in their every day
3 conduct of their work on your property.

4 Q. Are you saying that Alan England didn't
5 appreciate the danger of falling?

6 A. He did not appreciate the danger of falling
7 such that would end up with the type of injuries that he
8 presently has or worse. This is the greatest hazard
9 faced in construction. It's very severe in other
10 industry.

11 Q. What's your basis for saying that Alan England
12 did not appreciate the risk of being injured by a fall?

13 A. I go back to the word consequences. Most
14 people think they can catch themselves if they're
15 falling. Very few people, including lawyers and experts,
16 hold onto stair railing, which are meant as a fall
17 protection device. They may appreciate that they can
18 fall. But they don't appreciate the consequences of
19 falling and the fact that several million people go to
20 the emergency room from falling on their home stairs or
21 office stairs every single year.

22 So, they don't understand the
23 consequences and the cost to society of it and the cost
24 to the host employer.

1 Q. So, you're not saying that Alan England did
2 not realize that he could fall and could hurt himself
3 while falling?

4 A. I'm not saying that, per se. I'm saying that
5 the consequences are not understood by anybody in
6 America.

7 Q. Did Alan England tell you that he was unaware
8 of the risk of falling and hurting himself?

9 A. No. I never asked that question to him. I
10 would suspect he would say that he was aware. But he
11 wasn't aware of the consequences of how much the costs
12 would be to himself or others. And it's the duty of the
13 premises owner to know that anybody coming on their
14 property would not understand the hazard and would not
15 take any matter themselves or any solution to remediate
16 that exposure.

17 Q. Are you aware that Mr. England was an
18 independent contractor?

19 A. Yes.

20 Q. What does that mean?

21 A. Compared to what? Independent contractor as
22 far as GAF is concerned?

23 Q. Yes.

24 A. Whoever hired him or found the work for him to

1 do.

2 Q. He owned his truck and his trailer?

3 A. Right.

4 Q. He was in business for himself?

5 A. Yes.

6 Q. He was not an employee of GAF?

7 A. That's right.

8 Q. What is the distinction between being an
9 independent contractor and being an employer under
10 Indiana law?

11 MR. FOLEY: In what context, Randy? I
12 think there's a lot of distinction. I don't think that's
13 an appropriate question.

14 BY MR. NYE:

15 Q. You can answer.

16 A. Could you clarify?

17 MR. FOLEY: Let me object. I think the
18 question is ambiguous. I would object to the form of the
19 question.

20 THE WITNESS: Can you restate it in a
21 different words?

22 BY MR. NYE:

23 Q. What is your understanding of the distinction
24 between an independent contract and an employee under

1 Indiana law?

2 MR. FOLEY: Same objection.

3 THE WITNESS: An employer usually pays a
4 salary to an employee in this type of work. GAF, in
5 fact, did have its own employee drivers on this site.

6 When an employee might fall, for
7 example, he would fall under the worker's compensation
8 statute in Indiana being an employee of, actually, a
9 fee-paying employer.

10 If an independent contractor is driving
11 the truck, he is not covered by the Indiana worker's
12 compensation statute and would have to look to his own
13 worker's comp contracts, if he has one.

14 BY MR. NYE:

15 Q. Do you have an opinion on whether GAF had a
16 duty to provide a safe place to work to independent
17 contractors like Alan England under Indiana law?

18 A. Yes. I believe that falls under premises law.

19 Q. Alan England, as an independent contractor, he
20 was his own employer.

21 Correct?

22 A. I believe so.

23 Q. And did he have responsibilities under OSHA as
24 an employer?

1 A. That question is whether OSHA applies it to a
2 sole employer/employee. I'm not sure it did under the
3 OSHA act applicable at the time of his accident. But if
4 he had two or three employees, then certainly he would
5 fall under that.

6 I think as one employee, also, you may
7 not be entitled to worker's compensation as an
8 owner/operator, not having read the statute for Indiana.

9 But if he had chosen to apply OSHA
10 regulations to his own conduct, then I think you would
11 like to ask that question.

12 Q. No. I'm asking whether he was obliged to any
13 obligations under OSHA, not what he might have liked to
14 do, but did he have any duties under OSHA?

15 A. I think strictly speaking the answer would be
16 no. Would it be a best practice? Yes. Those that he
17 could follow. There are some he could not follow.

18 Q. What OSHA standards or concepts do you believe
19 he should have followed?

20 A. If he was aware of a hardhat requirement in
21 the plant, if there were dangers of things falling on his
22 head, then, if he was notified of that, then he should
23 wear a hardhat on his own recognizance, not even with
24 regard to the employer, the controlling employer's

1 requirements. He should wear something that was
2 appropriate to fend off whatever might be falling,
3 falling on top of his head.

4 If there was a cutting hazard, or an
5 abrasion that was unacceptable, then if he appreciated
6 the hazard, then he should apply hand protection, gloves,
7 solvents for your hand. If there was something that
8 would dry the oils on your hands, for example, and cause
9 lesions and other discomforts.

10 And if there was a height hazard, then,
11 you would look to the host employer's rules, possibly the
12 rules that apply to their own employees and look to see
13 how you would apply those rules. There was fall
14 protection equipment that the host employer, GAF, had,
15 according to one of the components, at least one of the
16 components, being exposed to. And a diligent person
17 might seek to see how to apply that, where would the
18 anchorage point be for lanyards and harnesses, where
19 would that be around the truck. There was certainly
20 nothing around the truck, if it's your own truck, to
21 attach to.

22 So, there would have to be an
23 understanding that the host employer would provide some
24 of the protection and you might provide some of your own

1 protection, such as a harness.

2 But when the argument finally has
3 settled, there was never any discussion going back into
4 history, according to the depositions, that any of the
5 deponents could recall regarding providing protection,
6 looking out for invitees, like independent truck drivers,
7 like Mr. England. And, therefore, there was no basis to
8 provide any protection. There was no basis to expose him
9 to actually what hazards were recognized by the GAF
10 management.

11 And, therefore, it now boils down to who
12 is most responsible for the hazard that Mr. England
13 faced. And in the case of the hazard, in the course of
14 his normal duties or exception duties, to take a load of
15 shingles from this GAF plant, being required to tarp,
16 being exposed to fall hazards, that Mr. England would
17 reasonably be provided the shelter of some same rules
18 that GAF would provide for the protection of its invitee.

19 Q. I understand what you're saying. GAF should
20 have provided rules.

21 In the absence of rules, do you believe
22 he had any duty to exercise reasonable care for his own
23 safety?

24 A. Absolutely, yes. What he understood to be

1 areas of where he could be injured, that he was aware of.

2 But I don't think he is expected by any
3 person to provide his own finger dock and to provide a
4 station for tarping, which might cost tens of thousands
5 of dollars.

6 Q. Do you believe he could have provided a
7 stepladder?

8 A. Get on and off the vehicle, off the flatbed,
9 that's one way of doing it. Some truckers do that. They
10 keep on using it as long as it does not get stolen.

11 Q. What about an Anderson Ladder? Would you have
12 recommended he have one of those with him?

13 A. Yes, I would. It has only recently come on
14 the market. I would recommend that all flatbed drivers
15 that I'm familiar with should invest in one.

16 Q. Would it be your recommendation he use a
17 stepladder?

18 A. Well, a stepladder has a problem how do you
19 face onto the structure and how big is the stepladder to
20 begin with. And you should only really walk off a
21 stepladder -- stepping off a stepladder isn't recommended
22 by any safety organization or any manufacturer.

23 Q. You would recommend the Anderson Ladder. And
24 you said they cost about \$300?

1 A. Yes. I think so.

2 Q. Speaking of things he could have done for his
3 own safety, any reason he could not have asked Mr.
4 Williams to move his truck?

5 A. There is no reason why he could not have found
6 the driver. I don't believe he thought there was a
7 driver there, and he was just locked in. There was no
8 place for him to go. I get the feeling that there was no
9 place, unless he had all of the trucks moved, he was
10 simply trapped in the place besides the concrete blocks,
11 concrete barriers.

12 Q. Mr. Williams was right there, close enough to
13 hear the impact when he fell?

14 A. Apparently so.

15 Q. Don't you think he would have been well
16 advised to go over and ask Mr. Williams to move his
17 truck?

18 A. His statement in his deposition was that he
19 wasn't aware there was another driver in the vicinity.

20 Q. If he walked over, and there was Mr. Williams
21 to talk to?

22 MR. FOLEY: Well, let me just object,
23 Randy. I think you're being argumentative at this point.
24 He has answered the question.

1 MR. NYE: I don't believe he has.

2 BY MR. NYE:

3 Q. Mr. Ellis, was there anything to prevent Mr.
4 England from going over and asking Mr. Williams to move
5 his truck?

6 MR. FOLEY: Same objection.

7 THE WITNESS: If he was aware of Mr.
8 Williams, there's no reason he couldn't have done that.

9 BY MR. NYE:

10 Q. Wouldn't you have advised him to look for the
11 driver and have him move the truck?

12 A. I would certainly have counted that as one of
13 things I would have done. I have special knowledge in
14 this area, too. There are a lot of things I would have
15 done that he maybe was not aware of. Again, it's not
16 expected that a person on your site will actually take
17 prevention measures. You have to assume that they will
18 not do that. That's why you must provide protection for
19 them as a controlling employer.

20 Q. Well, what I want to ask you about is whether
21 there are things Mr. England could have done to avoid the
22 accident?

23 A. I'm saying from my place that there are a
24 number of things he could have done. But I'm not saying

1 he would have known that.

2 Here is a driver going from Point A to
3 Point B, and maybe even several times Point A to Point B,
4 but also to C, D, E, F, G, and there are a variety of
5 safety practices that these locations have, some that
6 provide fall protection and some that do not. I think
7 for him to come up with own protection, I think, is not
8 reasonable.

9 Q. Was Mr. England aware that it would be safer
10 for him to strap his truck from the ground as opposed to
11 climbing up on the truck?

12 A. I think you'll have to ask Mr. England that
13 question. I don't think he has been asked that question.
14 I would expect him to say it was safer to strap it from
15 the ground.

16 Q. That's common sense?

17 A. I don't use the word common sense or the term
18 common sense. I would think that anything you do from
19 the ground I would encourage as a trainer.

20 Q. Is there any reason to think Mr. Williams
21 would not have cooperated and moved his truck if he had
22 been asked?

23 A. I can't answer that question. I don't know.
24 The circumstances were such that neither knew of each

1 other's presence.

2 Q. How far apart were they?

3 A. Fairly close. I guess there is noise in the
4 background. Things going on. Forklift trucks moving
5 around. I'm not sure we got a clear picture of the
6 working conditions.

7 At this point, could I take a quick
8 break?

9 MR. NYE: Sure.

10 (Off the record at, approximately, 12:45
11 p.m.)

12 (Back on the record at, approximately,
13 12:55 p.m.)

14 MR. NYE: Back on the record.

15 BY MR. NYE:

16 Q. Do you have any opinion as to why Mr. England
17 fell on the date of the accident?

18 MR. FOLEY: Randy, when you say that,
19 let me just make a point of clarification.

20 Do you mean whether he slipped or
21 whether he lost his balance? Is that what you're
22 referring to? Or did he fall because there was no fall
23 protection? Are you asking how the accident happened,
24 what made him fall?

1 MR. NYE: I thought why was simple
2 enough. Let me restate it.

3 BY MR. NYE:

4 Q. Mr. England had a lot of years of driving a
5 flatbed truck, presumably, strapping all of them, tarping
6 many of them. He had never fallen before.

7 Do you agree so far?

8 A. I believe that's true.

9 Q. Do you have any opinion as to why he fell on
10 June 13, 2008?

11 A. At this time, I don't have an opinion, except
12 to say any exposure to height over four feet is
13 dangerous, and there should be fall protection provided
14 by the host employer. And he should be trained. And he
15 should be observed from time to time.

16 Q. Do you know how old he was on the date of the
17 accident?

18 A. Around 60.

19 Q. Have you considered the possibility his age
20 may have contributed to his fall?

21 A. I'm 68. So, how do I answer that for myself?
22 I think he seems to be reasonably capable, from having
23 read his deposition a couple times, of being a truck
24 driver. One is more cautious.

1 Q. Do you know whether he had any chronic medical
2 conditions on the date of the accident?

3 A. I do not know that.

4 Q. Do you know whether he was on any medication
5 on the date of the accident?

6 A. I don't know that. I believe he was not. But
7 I don't know that for sure.

8 Q. Were you aware of his weight on the date of
9 the accident?

10 A. I thought I had notes on that. But I'm not
11 aware of that right now.

12 Q. If I told you according to the medical records
13 he weighed over 340 pounds, do you agree that his weight
14 may have had a contributing factor to his fall?

15 MR. FOLEY: Well, Randy, that is
16 speculative. Let me object. That question is pure
17 speculation.

18 MR. NYE: Pure speculation as to his
19 weight?

20 MR. FOLEY: Pure speculation as to what,
21 if anything, caused him to fall. And that's why they
22 needed fall protection. You're just asking him to
23 speculate, I think. That's not a proper question.

24 BY MR. NYE:

1 Q. You can answer the question.

2 A. The question, to me, comes through as saying
3 the heavier you are, the more likely you are to fall. I
4 don't think there's any connection in my 40 years in this
5 business of connecting weight, certainly, around that
6 area, maybe up to 400 or so, with the tendency to fall
7 just like a person who is 100 pounds would fall less than
8 a person who is 250 or 350 pounds.

9 I'm a keen collector of statistics and
10 updating those statistics. I have never seen any records
11 of statistics with regards to the likelihood of a
12 340-pound person would fall more likely than a 200-pound
13 person or 100-pound person. I know there are concerns
14 about the equipment in recent years. But most of the
15 leading manufacturers now have their equipment and would
16 fit onto one of the pictures that I brought with me today
17 in another case where the maximum intended load of a
18 person would be over 400 pounds, 440 pounds. So, that
19 would certainly take into account, and in this same time
20 period, Mr. England's weight. Previously used to be on
21 the order of 300 pounds. In recognition, men gain weight
22 of two pounds a year once they hit 50. Manufacturers are
23 taking note of that and building their systems to greater
24 tolerance of heavier weights. Talking about at the time

1 of this incident.

2 BY MR. NYE:

3 Q. So, you think short of 400 pounds, weight
4 would not affect his likelihood of falling?

5 A. Well, I don't think I answered it that way.
6 Obviously, the question is, if a person falls, the
7 heavier you are, you're going to have more injuries. I
8 think there may be certain kinds of falls. You can get
9 very lucky on fall, if you hit the right thing, or if you
10 hit a softer object.

11 Certainly, the ankle is not built any
12 better, if you turn your ankle at 400 pounds versus
13 200 pounds, you're probably going to receive more
14 injuries. And the same goes for other structural parts
15 of the body, too. But I'm not a doctor. And this
16 question probably should be answered by someone with -- a
17 physician with orthopedic qualification.

18 Q. Have you made an assessment of Alan England's
19 credibility?

20 A. One of the reasons I received his video
21 deposition was to look at the type of person we're
22 dealing with here as a plaintiff. I believe he has
23 excellent credibility.

24 Q. Would you agree that is an issue for the jury

1 to decide?

2 A. Certainly.

3 Q. You have never been to, I believe, tell me if
4 I got this wrong, you have never been to the Michigan
5 City GAF plant.

6 Correct?

7 A. True.

8 Q. Have you been to any of the GAF plants?

9 A. I'm not sure. I seem to remember to have been
10 to a GAF plant in North New Jersey, but I can't say for
11 certain.

12 MR. FOLEY: Is there one, Randy?

13 MR. NYE: I don't know.

14 BY MR. NYE:

15 Q. Maybe this is sufficient for follow up.

16 Do you remember, an awkward question,
17 since you're not even sure you were there, do you have
18 any recollection of anything you might have seen, if you
19 were there at a GAF plant in New Jersey?

20 A. No. Nothing comes to mind right now. The
21 reason I would be visiting any plant would be to look at
22 a fall exposure that the management would be aware of,
23 such as walking on the roof, or top of overhead cranes,
24 or pits, or on some of the equipment that they have. But

1 I don't recall.

2 Q. I know you've seen them, loads on flatbed
3 trailers being strapped before.

4 Have you seen, specifically seen loads
5 of pallets on shingles being strapped before?

6 A. I don't recall that.

7 Q. You've done consulting work for Alcoa. You've
8 visited their plants.

9 Did I get that right?

10 A. Many. Right.

11 Q. How many Alcoa plants have you been to?

12 A. I haven't tried to count them. It's --

13 Q. Ballpark.

14 A. Fifteen.

15 Q. When you have been to the Alcoa plants, my
16 understanding is that there are fall protection systems
17 for loading trucks at these plants?

18 A. And even unloading trucks, too.

19 Q. Just in general trucks terms, would you
20 describe what those devices are like?

21 A. Yes. In the Phoenix plant in Arizona, I
22 designed a horizon lifeline system for loading, strapping
23 and tarping. And that informal sketch that I provided
24 them was brought into existence by connecting two

1 buildings and roofing it.

2 And the interesting thing about it was,
3 not only did the truckers have fall protection being
4 trained by video, this was a cable system, and there were
5 several rows of them so the trucks could have throughput
6 at a reasonable rate. They were instructed to wear
7 hardhats, of course, in that area. And this became the
8 area, also, that the loading was done. It was intended
9 only for visiting truckers to tarp there, but with
10 protection from the sun and to protect them from falling,
11 it became a fact that the whole plant was changed around
12 to use that system, which was, essentially, connection
13 between two of the existing buildings.

14 We have done similar cable systems for
15 the largest producer of aluminum cans in the country.
16 That's in Kentucky. And we have been involved in the
17 design of rail facilities for loading, which I have a
18 sketch of with me here today as an example.

19 I'm handing you the document.

20 MR. NYE: Could you mark that, please.

21 (Sketch was marked as Ellis Exhibit No.
22 12 for identification.)

23 BY MR. NYE:

24 Q. So, Exhibit 12 is the device.

1 Is this something --

2 A. It's an example.

3 Q. Is it an example of a specific system that is
4 actually in use or an idea?

5 A. No. We've installed systems like that, but
6 not that particular case. That was a case I was doing.

7 Q. So, this was prepared for litigation?

8 A. That is correct. That particular one. But it
9 followed, and we used the same engineer to design it who
10 had done installations elsewhere.

11 Q. You spoke in terms of we have provided. I
12 assume you're referring to your company, your companies?

13 A. Ellis Fall Safety Solutions is the company
14 that actually would conduct this work and provide the
15 labor to do it and the training to follow.

16 And the one you're looking at is the
17 shipper of pipes for creating roadside signs, a vertical
18 component thereof.

19 Q. Does your company actually build these
20 systems?

21 A. Yes.

22 Q. As well as design them?

23 A. Yes.

24 Q. And what would the fee for your company be to

1 design and build systems like that shown in Exhibit 12 or
2 Exhibit No. 5?

3 A. I don't know for sure. I would have to go
4 back and look at some records. My thought is, a cable
5 system, several thousand dollars. And for a rail system,
6 like the one shown, about the same price. Sometimes the
7 rail systems are a little more expenses depending upon
8 the post systems to hold them up. In this case, working
9 on the bar joist in the ceiling.

10 Q. You're referring to Exhibit 12?

11 A. Correct.

12 Q. Both roughly the same fee?

13 A. In the cases where we're looking at the
14 sketches of such systems, cable and rail systems,
15 normally rails have elevated posts to support them are
16 going to be more expensive.

17 For example, if we did a railroad yard
18 for the maintenance work, the guys who worked on
19 unloading railroad cars, we would probably do a rail
20 system. That rail system would have to have posts to get
21 it up in the air.

22 Q. At Alcoa, if we could get back to that --

23 A. I haven't finished.

24 Q. Oh, I'm sorry. Go ahead.

1 A. But with regard to Alcoa, the type of systems
2 that are presently used in the Midwest, the Tennessee
3 plant, two or three plants in Central Northeast
4 Pennsylvania, they're all either fixed or moveable
5 catwalks with the driver himself. He drives into a
6 two-sided dock. And then he pushed mechanically a
7 100-long foot section of catwalk up against the exposed
8 side of the truck or trailer.

9 Other ones involve putting in post
10 systems. A slot into the rub rail. Some people have
11 made their own systems slotted, and then it creates part
12 of a rating system, a piece that was slotted into the rub
13 rail gaps, in the back of it, would be the one side, and
14 then that leaves you exposure for two sides. And then
15 you have an observer to keep people away from the near
16 side. And there's a barrier put in for the end of the
17 trucker, too.

18 The other types of systems, which are in
19 the article, and in the follow-up website on our Fall
20 Safety dot com website, on trucking solutions. You click
21 on each one of those. And you'll see net systems.
22 You'll see rail systems. You'll see railing systems.
23 You'll see 12, 15 or 20 systems.

24 I always go back to the system which we

1 described earlier of putting in two by fours and plywood
2 to provide a barrier between you and the fall hazard,
3 which many trucks do use when they're out on the road.
4 I'm sure on your way back to the airport, you'll probably
5 see two or three of those.

6 Q. At Alcoa, what is being lowered on the trucks?

7 A. Mostly, aluminum coil. Different thicknesses.

8 Q. Given where I live, I see steel go by on
9 trucks all of the time. I don't have a picture in my
10 mind of aluminum coils.

11 How big are they?

12 A. Some are huge. Some weigh 30,000 or
13 40,000 pounds.

14 Q. We're talking a coil in the conventional
15 sense?

16 A. Eight feet in diameter, approximately. Four
17 or five feet up to eight feet.

18 Q. When these things are loaded, are they
19 loaded --

20 A. Coils?

21 Q. Yes. How are they loaded?

22 A. Hopefully safely.

23 Q. I mean, are they --

24 A. The safest way is the donut hole to be facing

1 up and down.

2 Q. Is that what happens, or is the donut hole
3 horizontal?

4 A. It depends on the practice of the plant and
5 what material handling is like. If you load by crane,
6 the donut hole is going to be side to side, which is the
7 most dangerous position. If you load by forklift, they
8 can be laid flat.

9 Q. What does Alcoa do? How do they do it?

10 A. I think they have both. They have good
11 chains, so they don't fall under the cab.

12 Q. Are you aware of any shingle manufacturers
13 that provide fall protection devices the kind we're
14 discussing?

15 A. Not at this moment.

16 Q. Through your article, as well as what Mr.
17 England testifying to, and just driving on the highway,
18 my impression is an awful lot of stuff gets moved on
19 flatbed trailers?

20 A. Yes.

21 Q. Would you be able to quantify that?

22 A. In terms of the number of...

23 Q. Truckloads a year?

24 A. No.

1 Q. Or whatever statistics you might know?

2 A. The number of flatbeds on the road?

3 Q. Yes.

4 A. Over a million. Maybe several million.

5 Q. Now, do you mean million or several million
6 trucks?

7 A. Yes.

8 Q. Flatbed trucks?

9 A. Flatbed trailers. There are more trailers
10 than there are trucks.

11 Q. I'm doing the same thing you are.

12 And they move all different kinds of
13 merchandise and products and that's kind of the point of
14 it.

15 Right?

16 A. If you're an independent operator, you're
17 going to haul anything from chicken to coil of steel.
18 Wherever you get a load going and a load coming back,
19 that's the trick. You better be good on the Internet,
20 too, to find out where those loads are so you can track
21 to it once you made your initial delivery.

22 Q. For this million plus flatbed trucks that are
23 on the road every day, what proportion of them will be
24 loaded and unloaded or unloaded at a place with fall

1 protection devices of the kind that you've discussed here
2 today?

3 A. Well, another way of asking that question is,
4 what percentage of plants that ship would have fall
5 protection for their independent contractors. I think
6 that's the flip side of your question.

7 Q. Yeah.

8 A. More. More and more. I can't put a figure to
9 it. I know every single Alcoa plant has protective
10 measures. And that is a specific area that corporate
11 Alcoa requires for the last eight to ten years is that
12 every Alcoa shipping location and receiving location has
13 fall protection for trucks that are expected.

14 Q. Can you give me any sort of sense of -- I
15 supposed thousands of places from which they're loading
16 flatbed trucks on a given day, what percentage have fall
17 protection devices?

18 A. Yes. I'm going to talk about shipping now,
19 not receiving. Shipping is the main thing. Receiving, I
20 think, you can remove, by just taking the bungee off the
21 tarp, and you can pull the tarp off.

22 But in terms of shipping, I think that
23 the laws in each state and the realization that you're
24 responsible to keep safe your employees, but also your

1 invitees is -- the message is out there. While it's not
2 -- I want to say half, but I'm not sure it's half -- but
3 I'm saying we're approaching half of the shippers in the
4 country as a whole have some means of fall protection
5 that would be helpful in controlling fall hazards at
6 their shipping location.

7 Q. What is the basis for you saying it is
8 approaching half?

9 A. Just the fact it comes up in discussion.
10 Since I got the article and have the website put
11 together, many, many people have contacted me about
12 consulting and also the shippers themselves. And it's
13 going to be more in some industries than other
14 industries. Some are going to have nothing. Some are
15 going to be more. And it depends on if they're willing
16 to do the throughput calculations to determine just how
17 many facilities it's going to take in a given area where
18 you do your strapping, your tarping and how many trucks
19 and trailers you can put through there.

20 The one that we designed and got built
21 in Kentucky had eight lanes for trucks to go through.
22 And two of those lanes were for independent truckers who
23 had a type of tarp that is automatically deployed, and
24 you can actually concertina, c-o-n-c-e-r-t-i-n-a,

1 something like that, concertina it up to one end, load
2 with a crane or forklift, and then pull it by hand. And
3 I've done this in Newark, Delaware where there's a
4 manufacturer there. It takes three days to put these
5 things on. You can push it by hand.

6 Q. I'm not asking you about specific examples or
7 antidotal evidence. I'm asking for any source of actual
8 statistics, actual numbers of what percentages of trucks
9 daily are loaded with fall protection.

10 Are you aware of any reliable
11 statistical source?

12 A. No. I'm not. It varies by industry. So,
13 certainly, if you had a previous accident, that plant is
14 much more likely to have taken the hint and put
15 protection, availability at the top of their list for
16 safety investment in that plant.

17 So, if you've had a previous incident,
18 that usually triggers whether you put skylight screens on
19 the roof, or whether you put tarping stations on there,
20 probably, for your shipped goods to go through and have
21 people working at height to be protected.

22 Q. But you are not aware of any statistical
23 evidence or quantitative analysis of percentages of
24 actual use of fall protection devices for loading trucks?

1 Can you point me to anything?

2 A. No. But based on me -- I'm a good person to
3 talk about this subject, if it's carefully asked, the
4 question, because I believe that half of all of the
5 facilities that have experienced an incident in their
6 past, within two or three years, at least half of them,
7 or if not a good majority of them have got fall
8 protection in place of some sort right now.

9 Q. And what is your source for that?

10 A. I've been around the fall protection business
11 now since 1970. I've visited thousands of plants. I
12 continue to visit plants almost every week. Probably am
13 contacted on half of all of the skylight fall throughs in
14 this country for the last several years. What I --

15 Q. Well, this case has nothing to do with falling
16 through a skylight.

17 A. But you have wait until I finish my sentence.
18 Okay.

19 What I find there is that even though
20 skylights are left exposed, I mean, dome skylights fall
21 under roof skylights in metal buildings, that almost all
22 of them are protected after the event. So able to
23 approach a skylight. And the only reason the protection
24 of a screen on top has been put on there is because of

1 the fact that the owner has recognized that they have a
2 problem of independent contractors falling through their
3 building skylights, 30 feet to the ground, and most of
4 them are killed.

5 In this case, I would think the same
6 logic would apply, especially if the injury is
7 significant, or if the court find significant fault of
8 the controlling employer.

9 Q. Speaking of flatbed loads generally, they
10 almost universally have to be strapped, correct, or maybe
11 I should say universally they are all always strapped?

12 A. No. They're all set up to bolt onto the
13 flatbed itself. Sometimes pieces of wood are attached to
14 it so you don't have to strap. And, of course, coils we
15 already talked about chaining in several directions.
16 There are several different techniques to hold the load
17 stable. But they have to be checked and checked within
18 25 miles of shifting.

19 Q. So, they all have to be strapped or chained or
20 somehow affixed to the flatbed trailer every load?

21 A. Yes.

22 Q. Of all of these millions of flatbed loads,
23 what proportion are tarped? Obviously, it depends on the
24 type of product. I'm just speaking generally.

1 A. Close to half. You got some sort of tarping
2 arrangement no matter what the product is. The U.S.
3 Government, pretty much all agencies, now ship with
4 tarps. There's no need for keeping rain off the
5 structure. And it's growing. It's being pushed by
6 insurance companies in another area.

7 And there are requirements for trucks
8 that carry produce and stones. Each state has its own
9 requirement. It's under littering laws in Delaware, such
10 that you have to have a tarp over the goods, so they
11 don't whip out of there as they're traveling down the
12 idea.

13 Unfortunately, the problem is with those
14 types of trucks, some of which have automatic arms that
15 pull the tarp down, that they are destroyed over the
16 years of use. And my estimate of them is half of them
17 are not working. That's a 100 percent requirement the
18 State has. The tarping of aggregate and vegetable
19 produce and garbage.

20 Q. When systems like that, such as in Exhibit 5
21 and 12 are installed or overhead systems that you talked
22 about, who provides the harness?

23 A. Not the at-risk worker. In other words, if
24 you expect you're an independent trucker to bring in a

1 harness, it's not going to happen. If you're the
2 controlling employer, you provide the harness system, if
3 you're going to use a harness system. Some people don't
4 use harness systems.

5 Q. What does a harness cost?

6 A. Seventy dollars.

7 Q. And you think that would be unrealistic and
8 reasonable to expect an independent operator to provide
9 his own?

10 A. It's not the provision of the product, it's
11 the compatibility of other equipment that's on site. You
12 have to hook it up somehow. Who's going to verify the
13 compatibility on that day at that time. They go by
14 brand.

15 Q. What is the weight capability of these
16 systems?

17 A. Whatever they are designed to be. We design
18 it for 400 pounds after discussion with the owner.

19 And for two people, and we'll do up to
20 five on a continuous run in certain circumstances, if
21 it's five people working on the side of a building, we'll
22 design for that.

23 Q. Are there risks associated with having people
24 in these harnesses?

1 A. Are there risk associated with any harness
2 system? Yes.

3 Q. What are they?

4 A. Well, the fact every harness system is going
5 to wear out at some point. What that means, it could
6 just be taken, stolen, put some other place, removed.
7 There's no product to wear. There's no follow up.
8 There's no endorsement by the plant to expect the drivers
9 to just do something themselves. There has to be a
10 training program, some video. Or you do what Mobil did
11 before they combined with Exxon, which is, you don't let
12 them do the work at all. You let your own employees do
13 it while the driver drinks coffee.

14 The refinery that was across the river a
15 few years ago, that's the direction they took. We're
16 doing it, we're doing it ourselves for loading of
17 lubricants into oil tankers into tank trucks, for
18 example.

19 There are fitting problems with
20 harnesses. There are chemical problems with harnesses,
21 what they have chosen. The oversight by the host
22 employer is something that must be accounted for when
23 you're counting your expenses that you got to keep your
24 systems up and working.

1 That's why some companies prefer to use
2 the catwalks because it's less maintenance. On the other
3 hand, if there is more maintenance, truck drivers can't
4 drive straight, especially going backwards. And the
5 rails can keep them contained within catwalk, three-sided
6 catwalk structure, as they back up to it, there are
7 typically half-inch rubber on the rails because the
8 drivers are not able to drive a straight line. And after
9 a while, of course, two or three years, you drive into
10 the structure and destroy it. It's not able to be used
11 for a few weeks. So, that covers both the non-harness
12 area and the harness area.

13 Q. Your work in litigation consulting, how is it
14 divided between work for plaintiff attorneys versus
15 defense attorneys?

16 A. Typically, the last year or so, 80 percent
17 plaintiff.

18 Q. Eighty percent for plaintiff?

19 A. Right. But when I do defense, I usually
20 represent about five companies.

21 Q. Exhibit No. 3 is the list of cases in which
22 you have given deposition or trial testimony.

23 Of these 22 cases, how many of those did
24 you represent the plaintiff?

1 A. Is it not on there? There's a P and a D.

2 Q. I don't see it.

3 A. I don't see it myself. Do you want me to pick
4 out defense cases here, or what do you want me to do?

5 Q. If there are any, tell me about them, or just
6 mark them, if that's easier.

7 A. Let me see if I can.

8 Q. Or whichever you would like, or tell me.

9 A. I got you. Let me see. It may take me a
10 little while to get myself oriented. I'll keep on
11 looking. There are several of them. This is a defense
12 case. (Indicating.)

13 Q. Number 11?

14 A. Mum-hum. That's all I'm spotting right now at
15 the deposition and trial level. There may be one or two
16 on here. And the reason I may be having difficulty
17 picking them out is because my testimony is the same no
18 matter whose side I'm on.

19 Q. That's commendable.

20 So, you're saying of the cases listed on
21 Exhibit No. 3, only No. 11, the James Offord case is one
22 in which you assisted in the defense?

23 A. That I recognize. Yes.

24 Q. Your report, I think, has a copy of your

1 agreement with Mr. Foley regarding compensation for your
2 services?

3 A. Right.

4 Q. Is that still in effect?

5 A. Yes.

6 Q. Those fees?

7 A. Yes.

8 Q. Your fee for being here for the deposition is
9 \$2,250.

10 Correct?

11 A. Yes.

12 Q. In addition to that, what have your billings
13 to date been to Mr. Foley?

14 A. I saw an amount today, but here it is, right
15 here. That's the total billed.

16 Q. \$48,406?

17 A. Correct. Yes.

18 Q. My impression is, you have not done work with
19 Mr. Foley's firm before.

20 Is that correct?

21 A. I don't think I have.

22 Q. Have you had any sources of information or
23 anything you considered with regard to the opinions in
24 Alan England's case that we have not already talked

1 about?

2 A. Are you asking me?

3 Q. If it's in your report, I've seen it. That's
4 either not reflected in your report or that we have not
5 discussed today.

6 A. No. They're all here at this time.

7 Q. Are you planning any other work in this case
8 other than, I suppose, testifying at trial, if it gets
9 there?

10 A. Correct. I don't think I discussed anything
11 else to do at this time.

12 Q. Have you recommended or offered any additional
13 services or analysis to Mr. Foley?

14 A. No. I think Mr. Curry, who is the safety
15 director, who was remote from the Michigan location, who
16 was deposed, I haven't seen his deposition yet. I would
17 want to see that before trial. And any other nonmedical
18 depositions.

19 Q. Anything else?

20 A. Other discovery concerning whether GAF has any
21 fall protection systems anywhere in the country or what
22 has been recommended. More details about previous falls
23 as they provided the notice that most companies need to
24 act. And some aspects of law around that.

1 Q. You say in your report that Mr. England's
2 trailer was loaded with 14 pallets.

3 What is that based on? Is that based on
4 what he told you?

5 A. I think so. The documents that he was
6 provided with, which I can't remember exactly seeing it
7 or not, or whether it was represented to me, indicated 14
8 pallets, seven down one side and seven down the other
9 side.

10 Q. What, if anything, do you know about any
11 previous falls involved in loading trucks at the Michigan
12 City GAF plant?

13 A. I believe there was at least one. But I don't
14 know the details of that other case or cases.

15 Q. You don't know anything about why that
16 gentleman fell?

17 A. Not that I recall. I think there is some
18 explanation or something offered in testimony. But I do
19 not recall that, as we sit here today.

20 Q. There has been some discussion in Mr.
21 England's deposition of one of the finger docks.

22 Are there delays associated with using
23 finger docks?

24 A. You mean interruption in the throughput of the

1 shipping operation?

2 Q. That's one possibility. Yes.

3 A. Something has been said that there are
4 techniques. I've just been doing a course at Auburn
5 University in their Master's program how you calculate
6 these sort of things. Something that needs to be done.

7 For example, time spent to push a
8 railing on rollers and the space involved, being
9 outdoors, or on the inside, I would think that the simple
10 netting system, netting hangs vertically, and then you
11 simply take it on each rub rail location and just hook it
12 in and forms a nice little place to fall into. That's,
13 probably, the simplest of all in terms of costs,
14 construction. It would need some maintenance over the
15 years. I think it takes up the least space, as well.

16 So, I'd be looking for all of these
17 combination and whether or not we can rely on the 500 by
18 300, or whatever the size is, I think it was 50 feet by
19 300, I think that was the size that has been gathered
20 was, the area for the strapping and tarping of this
21 plant, and whether it's common practice for trucks to be
22 going in both directions because of other types of
23 construction. I think where you would put these tarping
24 stations with regard to typical usage at the plant.

1 So, it would be a project to sit down
2 and work out, but it can be done. There are ways of
3 doing it.

4 Obviously, I want to see no disruption
5 in the operation. In fact, maybe even more production
6 because the worker now feel safer no matter what age they
7 are or what weight they are. They're going to get on the
8 road, which is what all of them want to do, as quickly as
9 possible.

10 Q. We talked about this, but it is a little
11 unclear in my mind where it came out.

12 According to what he told you, Mr.
13 England, did he really recall whether he was trying to
14 walk along the rub rail or on top of the pallets of
15 shingles when he fell?

16 A. He recalled that previously he had done both
17 in different times, different locations. But that day,
18 he could not remember. But if he had to make a guess, he
19 would be on top of the load. So, he would be able to
20 feed the webbing down vertically through the opening,
21 rather than holding onto a strap and reach down. It is
22 more ergonomically acceptable when he thought it through.
23 He does not remember the day.

24 Q. He had done it both ways?

1 A. Previously. Right. He had done it holding
2 the straps for his balance and walking along in some
3 circumstances. And he had been over the top of the
4 material previously. But he felt he was over the tarp
5 this time feeding down, standing down, and feeding down
6 the webbing through the rub rail opening, but couldn't
7 say which. That's what comes out.

8 Q. Now, the paramedics in their report indicate
9 that he had fallen five feet.

10 Is that your recollection, as well?

11 A. No. But I'll take your word for it.

12 Q. It is in your report, if you want to look at
13 it.

14 A. Okay. Right.

15 Q. Any reason to think they were wrong?

16 A. Yes. Sure. They were going to say he fell
17 off his truck. How tall is his truck, four or five feet,
18 four or five feet off the flatbed. There's, obviously,
19 no frozen imagine in the sky of him standing on top of
20 the shingles.

21 But so, unless they got a witness to say
22 where he fell from, they would be guessing. Apparently,
23 ten feet of open flatbed each side at each end of the
24 trailer. But it doesn't tie into the work he was doing

1 or about to do, which was to drop a piece of webbing with
2 a metal buckle on the end of it and feed it through the
3 rail on the side of the trailer.

4 I read lots of these types of reports.
5 First impressions, they don't tend to take pictures like
6 they did in the past. He either fell from the flatbed
7 itself, which is four or five feet, or he fell from the
8 tarp. So, did they convince themselves he was walking on
9 the side of the rub rail, which would be four or
10 five feet, or did they convince themselves he was on top
11 of the shingles.

12 Q. Did they talk to him?

13 A. I don't know what his condition was.

14 Q. You can't believe the possibility they talked
15 to him?

16 A. No. I don't know whether they state they do.
17 But why would he remember them any better than he would
18 remember right now. Either way, it's above four feet,
19 which is the general industry rule that applies to plants
20 that you have fall protection. Because four feet is the
21 height where if you fall off naturally almost
22 semi-consciously is the first time your head impacts
23 directly to the ground. That's the why reason it was
24 chosen.

1 Q. Should he have been wearing a hardhat?

2 A. If it was the practice in the plant to wear a
3 hardhat, yes, he should have been. However, there's only
4 one hardhat that is recommended at this time for use on
5 flatbeds. And that is a Bullard Type II, and there's a
6 specific part number, which has an extension to support
7 the neck and also has a triple suspension under the chin.
8 And that Type II, the ANSI standards for hardhats is what
9 is recommended up to, I believe, 50 feet eye height. And
10 I published I think the article in Professional Safety.
11 That's their recommendation.

12 Q. "They" being ANSI?

13 A. The Professional Safety Magazine published by
14 American Safety Engineers. In my article there, that you
15 have a copy of, did mention that was recommended. I
16 think regular hardhat, be careful, that's meant for
17 deflection of bolts and nuts coming from the top. But if
18 you hit the ground with your neck, you'll have problems.
19 You can have paralysis issues. You'll bend the neck.

20 So, a regular hardhat would not be
21 appropriate. If the plant provided hardhats that were of
22 the Type II and provided by the Bullard instructions for
23 use on flatbeds only and not for planning the load, and
24 Alcoa had made that rule, then I would recommend the use

1 of such a hardhat, specifically tested for this type of
2 incident.

3 Q. So, you would only recommend him wearing that
4 if the plant required it?

5 A. I think it is an additional precaution. It is
6 not required by law. All hardhats right now are only
7 recommended to deflect objects falling from above. And
8 falling on your head is not things falling on you from
9 above. It's a good idea. It makes sense. There have
10 been a number of success stories in the stair erection
11 area where people have fallen on their hardhat and have
12 successfully survived. It's not a general rule. It's
13 not a substitute for fall protection.

14 Q. Mr. England, you've seen his deposition. He
15 had a contract, a hauling contract with Builders
16 Transportation Company?

17 A. Yes.

18 Q. Does Builders Transportation Company have any
19 responsibility for his safety?

20 A. Am I right in thinking that Builders
21 Transportation had a contract with GAF? Because there I
22 think we put the requirements in there for what their
23 duties were, if any.

24 Q. Well, I'm asking about the relationship

1 between -- the role of Builders Transportation.

2 A. Yes. I'm trying to find it in the exhibits.

3 Q. It's Exhibit 10.

4 A. Okay. I found it in my copy.

5 Q. Exhibit 10. Here you go.

6 A. Good. Thank you. Let me read it.

7 MR. FOLEY: Let me just object. I think
8 the document speaks for itself.

9 You're asking him whether that document
10 creates a duty.

11 MR. NYE: He's giving all kinds of
12 opinions on responsibilities. I don't know what's
13 different about this end.

14 MR. FOLEY: Well, I object. I think the
15 question you're asking him is a question that can be
16 ascertained by looking at the document. So, it speaks
17 for itself.

18 THE WITNESS: I want to clarify the
19 question relating to this agreement contract, hauling
20 agreement between Builders Transportation Company and Mr.
21 Alan England, the contractor. I'm not sure I recognize
22 that there is a claim against Builders Transportation,
23 which this would relate to.

24 So, could you clarify the question?

1 BY MR. NYE:

2 Q. Well, you have given opinions what about what
3 GAF's responsibilities are under the law of the State of
4 Indiana and OSHA.

5 And I'm asking you if Builders
6 Transportation Company, in your opinion, had any
7 responsibility with regard to the safety of Mr. England?

8 A. I have not seen the agreement between Builders
9 Transportation Company and GAF, if it exist. If there is
10 one, now is a good time to know that. Because I don't
11 think that Builders Transportation is a defendant in this
12 case. So, therefore, I have not been asked to look at
13 this.

14 Q. So, you have no opinion?

15 A. Not at this time.

16 Q. The company that dispatched Mr. England, do
17 they have any responsibility under OSHA or under any
18 Indiana law?

19 A. And who is that? Do I have a contract with
20 them, or is there a contract between --

21 Q. I don't know if you've seen it or not.

22 A. Don't know. Throw me a name so I can see if I
23 heard of it.

24 Q. Maybe we should move on. Just haven't thought

1 about that.

2 I would like to ask you a few more
3 questions about something that has already been marked.
4 If you'll excuse me, I'll come over here so we can look
5 at it at the same time.

6 A. Sure.

7 How long are we going today?

8 MR. FOLEY: Well, I assume you're
9 getting close, aren't you, Randy?

10 MR. NYE: Closer.

11 MR. FOLEY: Okay. It's two o'clock.

12 THE WITNESS: One thing I want to do is,
13 I want to bolt this down before I get a headache. Maybe
14 we can work a few more minutes. But we can go through
15 this right now.

16 BY MR. NYE:

17 Q. Referring to what has already been marked as
18 Exhibit No. 6, your notes, at the top it looks to me
19 like, as I read this, he was strapping his trailer,
20 noticed -- could you read that for me?

21 A. Noticed our guy on trailer, right, is the way
22 he expressed himself. This is Mr. Williams.

23 Q. This is Mr. Williams' statement that he
24 noticed -- our guy would be Alan England?

1 A. Right.

2 Q. So, he noticed Alan England on his trailer
3 prior to the fall?

4 A. Yes.

5 Q. So, this makes it sound like Alan England and
6 Rick Williams are strapping their trailers at the same
7 time?

8 A. On the trailer, does that mean he's strapping?
9 I don't know. Maybe yes. Maybe no. I don't know.

10 Q. Well, if Alan England had not yet gotten to
11 it, any tarping, so if he's on his trailer, he was
12 engaged in strapping. Would you agree?

13 A. There's so many operations that a trucker
14 does, I don't want to jump to the conclusion that he's
15 strapping his own truck. This guy was strapping, it
16 seems.

17 Q. "This guy" meaning?

18 A. Williams.

19 Q. Williams was strapping his trailer?

20 A. Yes. He noticed our guy on the trailer. Then
21 he tarped. So, then he tarped. So, there's some time
22 aspect involved here. And then, I guess, as he was
23 tarping, heard Alan fall, the effects of Alan's fall.

24 Q. So, you take this to mean that Rick Williams

1 was tarping his truck at the time that Alan England fell?

2 A. Well, it's a complex thing. I got down here.
3 These are flashes of conversation that are happening. I
4 didn't see anything in writing from Mr. Williams. "He"
5 being Mr. Williams was strapping his trailer -- noticed
6 our guy, Mr. England, on presumably his trailer. Then,
7 "he," meaning Williams, tarped and then heard him fall.
8 So, we're talking about different activities.

9 Q. Okay.

10 A. At the time he was strapping his trailer, Mr.
11 Williams, he noticed Alan on the trailer. He didn't say
12 which part of the trailer. And then some time later when
13 he finished strapping, then Mr. Williams tarped, and that
14 is when he heard the fall. I don't know what the time
15 period is. I don't know if it takes 15 or 20 minutes. I
16 don't know whether it's the beginning of the time period
17 or the end of the time period, whether then he goes to
18 tarp, gets the tarp up. I don't know. You could be
19 talking another 15 or 20 minutes.

20 Q. But Williams told you that "he," Williams was
21 strapping his trailer. And at that time, he saw Alan
22 England up on top of England's truck?

23 A. Yes. At that moment in time. But at a later
24 time, when he was tarping his trailer, he heard Alan

1 fall. I haven't quantified that yet in terms of time.

2 MR. NYE: That's all I have.

3 BY MR. FOLEY:

4 Q. I have just a few questions, Nigel, if I can.

5 Based upon your investigation in this
6 case and your experience in dealing with companies and
7 these issues of fall protection, in your opinion, was it
8 foreseeable for GAF and its representatives that Mr.
9 England and other truck drivers would get up onto their
10 flatbeds to either do tarping or strapping?

11 A. Yes.

12 Q. So, the fact that he was not in the process of
13 specifically tarping is of no moment. In your opinion,
14 it was still foreseeable that these drivers could and did
15 get up on their flatbeds for various reasons, whether it
16 is tarping, or strapping, or to catch a -- to thread a
17 strap that had gotten caught or other reasons?

18 MR. NYE: Object to the form of the
19 question.

20 THE WITNESS: I think it's in all of the
21 depositions that the observations were made that drivers
22 were either on the top of their flatbeds or on the loads
23 doing tarping work. And whatever kind of work is
24 involved that should have been anticipated.

1 BY MR. FOLEY:

2 Q. And based upon your experience and the
3 investigation that you've done in this and other cases,
4 is it your opinion that GAF should have had fall
5 protection for these truck drivers?

6 A. Absolutely, yes.

7 MR. FOLEY: And if I could look at
8 Exhibit No. 11 there, Randy, which was the ANSI thing
9 that you read.

10 MR. NYE: Yes.

11 BY MR. FOLEY:

12 Q. You were asked some questions about ANSI and
13 OSHA standards. And Exhibit 11 was marked, and there was
14 some discussion on it. You were asked about whether or
15 not Exhibit 11 specifically applied to loading and
16 unloading trucks, flatbeds, et cetera.

17 Is it also correct that Exhibit 11, Dr.
18 Ellis, under scope states, This standard sets forth
19 safety requirements in industrial and workplace
20 situations for protecting persons, areas/places where
21 danger exists of persons or objects falling through floor
22 or wall openings or from platform ramps? Is that what
23 that scope refers to?

24 A. I'm finishing the sentence. Also, in normal

1 temporary and emergency conditions. The answer is yes.

2 Q. And is it your opinion that ANSI 1910 and 1926
3 should have been used by GAF to create a set of policies
4 in the exercise of reasonable care to provide some type
5 of fall protection for business invitees on the property?

6 A. Yes. With the addition of one thing.

7 Q. And what is that?

8 A. They also should have read my book for
9 guidance.

10 Q. So, you were asked a lot of questions about
11 whether 1910 and 1926 specifically applied to loading and
12 unloading flatbeds, I believe. And on Page 4 you explain
13 the OSHA sections and the ANSI sections that you
14 reference in your report.

15 Can you just explain for us what you're
16 referring to there? How do these sections apply in our
17 case, the OSHA 582 and then the ANSI standards that
18 you're referencing on Page 4.

19 A. In 1972, DOT, and the Department of Labor,
20 OSHA, met to discuss a working relationship around the
21 application of rules for trucking, especially when trucks
22 were stationary and people were working on trucks. They
23 agreed to stay in close contact, both agencies. However,
24 as of the present day, there has been no meeting in the

1 last 38 years that would have fulfilled their commitment
2 in this area.

3 As a result, OSHA has cherrypicked
4 through its general duty clause, especially workers on
5 concrete trucks, and certain other vehicles, such as
6 aerial lifts to provide enforcement in the area of trucks
7 and trucking and other wheeled vehicles.

8 Since nothing addresses flatbed trucks
9 or panel trucks, where a known danger of falling occurs
10 in the normal operation of loading of trucks, then a
11 responsible employer, who is in a controlling position,
12 either under OSHA multi-employer work rules or directly
13 as a result of premises duty to provide a safe workplace
14 for invitees, Mr. England was an invitee on a continued
15 basis of many months and years, that a set of rules
16 should be formulated. And, perhaps, they only had to go
17 next door to the next company to ask to borrow their
18 rules because the rules that I've seen are set up very
19 similarly to recognize the hazards on the job, to
20 recognize where workers can go for bathroom facilities
21 and for safe walking in the area. Whether or not in what
22 areas to wear hardhats, what kind of hardhat. And other
23 safety rules that the drivers must comply with at the
24 time of entry to the plant.

1 Therefore, it would make sense to me if
2 knowing that GAF is applying fall protection rules,
3 apparently, with regard to harnesses and lanyards within
4 its own plant, according to the testimony in this case,
5 that they would also look to apply what they could out of
6 the OSHA regulations and rules for providing a safe
7 workplace to invitees. And then formulate that into a
8 serious maybe ten statements that could be easily
9 understood in large print, on one side of the piece of
10 paper, and present that to the drivers and have people
11 involved with drivers understand what their rules, or
12 what roles are to enforce that policy, and to write up
13 drivers that did not comply with fall protection when
14 leaving the ground.

15 Q. So, you were asked questions about whether or
16 not GAF could have been cited by OSHA for some
17 violations.

18 Am I right correct that even though
19 there may or may not have been an OSHA citation, is it
20 your opinion that GAF in the exercise of reasonable care
21 should have employed the OSHA and the ANSI standards to
22 which you refer in order to do what they could to provide
23 protection for those business invitees and independent
24 truckers coming onto their premises?

1 A. That's the starting draft. But then you got
2 to develop it to include features, which are particularly
3 applicable to drivers. And you got to incorporate
4 general workplace rules, their conduct, where they should
5 go, where they shouldn't go, which is typical for any
6 plant. So, those would be common. Apply the OSHA rules
7 for personal protective equipment, breathing apparatus,
8 if necessary, head protection, eye protection, face
9 protection, shoe protection, all those rules should be
10 incorporated here. And then have the specialty items,
11 which is putting up structures, they'd have to train
12 because those are not mentioned in any standard at this
13 time. Post systems, how far down in the ground would you
14 go. What sort of concrete block? What sort of forces
15 should you take on the top? There you would go to the
16 ANSI standards, and to, perhaps, items in my book. I
17 give an engineering treatise on how to go about creating
18 average points, which may be 25 feet in the area, which
19 would be needed for this kind of application.

20 So, certain areas you would have to go
21 beyond. But being in compliance of 5(a)(1) in applying
22 that to all people allowed on site, you would work
23 towards a document and provision of safety facilities
24 that would provide the necessary overhead protection,

1 which no driver could afford to bring with him and would
2 be possible to bring with him, and you provide it and
3 then enforce the use of it.

4 Q. So, in your opinion, could these OSHA and ANSI
5 standards and regulations have been employed by GAF to,
6 in the exercise of reasonable care, do what it could have
7 done to have prevented an accident like the one we're
8 investigating in this case?

9 A. Yes. If Mr. England had been trained, if the
10 facilities were there, if the facilities covered the
11 hazard that he was exposed to, a fall over four feet,
12 and, therefore, providing protection from that particular
13 hazard, that should be provided.

14 Q. Do you believe it was negligent on the part of
15 GAF to fail to provide this fall protection that you've
16 referenced?

17 MR. NYE: Objection. Calls for a legal
18 conclusion.

19 THE WITNESS: Yes, I do. Most
20 definitely.

21 BY MR. FOLEY:

22 Q. Did we mark all of the diagrams that you
23 bought?

24 MR. NYE: I think so.

1 BY MR. FOLEY:

2 Q. You brought some diagrams that show different
3 -- like Exhibit 5 is a method of fall protection that
4 you've designed in the past.

5 Is that correct?

6 A. Yes.

7 Q. And then the other exhibit is Exhibit 12.

8 That's another method of fall protection
9 that you've designed?

10 A. Yes.

11 Q. You mentioned these nets, safety nets, and I'm
12 just wondering, Doctor, do you believe that there was
13 fall protection that could have been employed on the GAF
14 property in Michigan City that would have both prevented
15 this accident and would have been feasible for GAF to
16 have provided?

17 A. All the methods I have talked about in my
18 report and also this deposition are feasible and cost
19 efficient. Namely, that they are far less cost than the
20 cost of one case of a person falling, which any one of
21 these protections would reasonably afford a reduction of
22 injury, if not the elimination of injury.

23 Q. And just some of the protections you've
24 mentioned I think would be the T-bars where there would

1 be a cable extending from one to the other?

2 A. Upside-down L's, which are one direction.
3 T-bars, which are shown in Exhibit 5 is another method of
4 holding cables. Rail systems. All of these are possible
5 and easily so for outdoor application because you don't
6 have to build it into the existing structure. There's no
7 overhead obstruction that we're aware of, based on the
8 pictures that were taken outside of the fence -- part of
9 the exhibits.

10 And now we have to make sure that the
11 equipment location, in a site location for installation,
12 or several locations for the number of trucks coming
13 through that location, we may have to have ten of these
14 workstations, and then somebody to do the calculation to
15 make sure they can get in and out with the same speed
16 that they would be able to do so without protection, but
17 yet, far safer an operation.

18 And probably, I believe, if the
19 protection was well engineered, that the drivers welcome
20 it, and they work faster to get out of there and get on
21 the road.

22 Q. And would the netting, also, work at this
23 site, do you know?

24 A. The netting I've seen so far has been used

1 internally. But I think it's so simple that after long
2 thought about all of these methods, having a vertical net
3 hanging on both sides of a truck, 48 or so feet long, a
4 driver simply goes and hooks it up, it takes him about
5 two minutes to do both sides -- how we deal with the end
6 is another issue -- I believe that's the quickest of any
7 kind of protection to put up, as long as it's not left
8 out there forever, depending on what the environment is,
9 maybe changing it out every three or five years, I
10 believe that is the simplest of all methods.

11 And it is being used by Alcoa and also
12 by a steel company in New Zealand and Australia, Blue
13 Steel (phonetic) -- B-L-U-E -- I'm still working on my
14 answer. I can't remember the second name of the company.
15 First name is Blue something Steel Company. It's in my
16 book.

17 Q. Were you finished with your answer?

18 A. Yes.

19 Q. Doctor, then, is the report that you have
20 identified, and I don't know if we've marked -- we've
21 marked his report as Exhibit No. 1 -- is that a true and
22 accurate copy of your report that includes the opinions
23 that you have in this case, in addition to any other
24 opinions that you have referred to in your deposition?

1 A. Yes.

2 Q. You were asked about hardhats.

3 To your knowledge, did GAF have any
4 rules for truckers coming onto the property to wear
5 hardhats?

6 A. I believe there were no rules for truckers
7 based on the testing of each other person in this case
8 that I read.

9 Q. And, in your opinion, could GAF foresee the
10 fact that truckers were not wearing hardhats on their
11 premises?

12 A. Of course, yes.

13 Q. And then, you were asked about other work that
14 you may or may not do.

15 If this case goes to trial in South
16 Bend, which is roughly half an hour from Michigan City,
17 would you plan on going to visit the site prior to trial?

18 A. If requested, yes.

19 MR. FOLEY: I think that's all I have.
20 Thank you.

21 BY MR. NYE:

22 Q. You testified that GAF should have read your
23 book.

24 How much does a copy cost?

1 A. \$125. Unless you're a member of the American
2 Society of Safety Engineers.

3 Q. \$125?

4 A. Yes.

5 MR. NYE: That's all I have. Thank you.

6 MR. FOLEY: I have no further questions.

7 Off the record.

8 (An off-the-record discussion took place
9 at this time.)

10 MR. FOLEY: Back on.

11 We'll waive signature.

12 (The deposition was concluded at,
13 approximately, 2:30 p.m.)

14 (Presentation, reading and signing of
15 the deposition were waived.)

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C E R T I F I C A T E

STATE OF DELAWARE:

:

NEW CASTLE COUNTY:

I, Gloria M. D'Amore, a Registered Professional Reporter, within and for the County and State aforesaid, do hereby certify that the foregoing deposition of J. NIGEL ELLIS, Ph.D., P.E., CSP, CPE, was taken before me, pursuant to notice, at the time and place indicated; that said deponent was by me duly sworn to tell the truth, the whole truth, and nothing but the truth; that the testimony of said deponent was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the deposition is a true record of the testimony given by the witness; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

WITNESS my hand and official seal this
31st day of August A.D. 2010.

GLORIA M. D'AMORE

REGISTERED PROFESSIONAL REPORTER

CERTIFICATION NO. 119-PS

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